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JURIDICAL REVIEW

SIR JAMES BALFOUR OF PITTENDREICH

"THE most corrupt man of his age." Such is the judgment of Principal Robertson on Sir James Balfour of Pittendreich, Official of Lothian, Parson of Flisk, Chief Commissary, Clerk Register, Prior of Pittenweem and Lord President of the Court of Session. The judgment is severe—especially since Balfour lived in the troubled times of sixteenth-century Scotland when corruption and double-dealing were the common currency of politics. Nevertheless, it is well merited, as can be seen from his career and from the almost universal opinion of his contemporaries.

During his long life, Balfour changed both his religion and his political allegiance several times. In each of the great upheavals of the time, he had some (usually discreditable) part. He joined the assassins of Cardinal Beaton; he was deeply implicated in the murder of Darnley and of the Regent Lennox; he furthered the fall of Mary; and he helped to bring the Earl of Morton to the scaffold. He survived attempts on his life, public accusations of murder, banishment and forfeiture. He received considerable pensions and grants of land; he married an heiress; and he held several lucrative offices in the state. While most of the prominent figures of the time met a violent end, Balfour contrived to die in his bed.

Balfour was the man whom Mary, Queen of Scots, called a mensworne heathen, the man whom she would never forgive because of his treachery.[1] Knox, his fellow galley slave, had no words to match his opprobrium and called him "the blasphemous Balfour," "a man without God," "a new denier of Christ and a manifest blasphemer."[2] Mary's Secretary, Nau, called Balfour " a traitor who offered himself to one party and then to the other."[3] The verdict of du Croc, the French representative, was "*ung vray traistre*."[4] He was a man " hateful to the people."[5] Only Killigrew, the English ambassador, could see any redeeming feature in Balfour: " he always made *professions of plainness* to me."[6]

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[1] *Memorials of Earls of Haddington* (hereafter *Haddington*), ii. 268–277; Nau, *Memorials* (1883), 77.

Subsequent historians have found no reason to question the weight of contemporary opinion against Balfour, although Walter Goodall, in his preface to Balfour's *Practicks*, attempted a limited rehabilitation.

Balfour's career is of interest in itself and also because it illustrates the tortuousness of Scottish history during the reigns of Mary, Queen of Scots, and James VI.

Early life

The date of birth of James Balfour is not known; but it was probably about 1525.[7] He was the son of Sir

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[2] Knox, *History* (Woodrow Society), i. 235; ii. 44.

[3] Nau, 44.

[4] *Calendar of State Papers, Scottish* (hereafter *CSPSc*), ii. 335

[5] *Calendar of State Papers, Elizabeth, Foreign* (hereafter *CSPFor*), x. 182.

[6] *CSPSc*, iv. 679.

[7] Balfour's first appearance in the records is in 1546 when, with his father and brothers, he joined the rebels in St. Andrews Castle. He was old enough then to be seeking a benefice, to be converted to Protestantism (and to defend it to the death) and in 1548 to be sent to the galleys with Knox. If he was of sufficient age then to be a priest (*vide infra*, n. 25), it would be plausible to put the year of his birth at 1525, thus making him 15 when he matriculated at St. Andrews. This would give the following not improbable chronology.

Date	Event	Age
1525	Birth	
1540	St. Andrews University	15
1544	Wittenberg University	19
1546	At St. Andrews: converted	21
1548	Imprisoned in galleys	23
1549	Released, made Official	24
1560	Rector of Flisk	35
1561	Extraordinary lord	36
1563	Ordinary lord	38
1564	Chief Commissary	39
1566	Marriage: Clerk Register	41
1567	Lord President	42
1571	Forfeited	46
1579	Exile	54
1580	Return	55
1583	Death	58

Michael Balfour of Montquhanny.[8] His connections with Fife suggest that he was a native of that county.[9] He was possibly one of the James Balfours who attended St. Andrews in 1539 or 1540 and he was almost certainly the "Jacobus Balfoureus Scotus" who matriculated at Wittenberg in 1544.

His first entry into public affairs was in 1546. Then he and his brothers David and Gilbert, and their father Michael, entered St. Andrews Castle where the rebels and heretics who had slain Cardinal Beaton were holding out against the Regent.[10] Michael Balfour appears to have been *persona grata* both with the Castilians and with the besiegers. Knox accuses him of treacherously entering into a truce between the Castilians and the Regent.[11] Balfour was presumably comprehended in the papal remission in favour of the Castilians for their part in Beaton's assassination. The remission was contemptuously rejected by the Castilians who had only used it as a device to revictual the castle. At this time Balfour was a fanatical Calvinist, having been recently converted by Knox who regarded him as the chief and principal Protestant in the realm.[13] By the terms of the surrender (which was probably unconditional) Balfour, along with the others, was compelled to go into exile. He and Knox were among those impressed into the French service as galley slaves.[14]

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[8] *Scots Peerage*, i. 533.

[9] *Records of St. Andrews* 1413–1579 (SHS), 243, 245, *etc.*; Föstermann, *Album Academiae Vitebergensis* 1502–60, s. 216a, Zeile 7. Goodall, with authority, states that Balfour was a student of divinity and law: Balfour, *Practicks* (1754), preface. His subsequent career in these professions suggests that this was the case. Until he was knighted he was generally referred to as "Maister," the designation of a Master of Arts: *e.g.*, Knox, i. 202; ii. 44; Pitcairn, *Criminal Trials* (Bannatyne Club), i., 393*; Patrick, *Statutes*, 88, n. 1. He was undoubtedly a judge and a legal author, but he does not appear to have been a member of the Scottish bar: *Faculty of Advocates* (SHS). His tenure of ecclesiastical benefices is no certain indication—especially in sixteenth-century Scotland—that he was in orders, although Knox refers to him as being not yet with a "cope": Knox, i. 202, 228.

[10] *Ibid.* i. 182.

[11] *Ibid.* i. 183, 202.

[13] Balfour was later (in 1566) to deny that he had ever been a Calvinist but according to Knox, "two hundred witnesses . . . know he lies": Knox, i. 202, 235.

[14] *Ibid.* i. 207; Lesley, *History* (Bannatyne Club), 195; Spotswood, *History* (Spotswood Society), i. 130.

Regency of Mary of Guise

In the summer of 1548 the galleys came to Scotland. Some time thereafter, according to Knox, Balfour and his brothers were released.[15] By about February 1549 at the earliest Balfour was made Official of Lothian, a high ecclesiastical judge.[16] He certainly held this office in June 1555 when he appeared in the Justice Court claiming immunity for a churchman[17] and he remained Official until the abolition of the ecclesiastical jurisdictions in 1560.[18]

After the " uproar for religion " which broke out at Perth in May 1559,[19] Balfour became a propagandist for the Dowager.[20] Then he joined the Reformers to bring dissension among them[21] and to spy on their activities.[22] In December the Catholic Earl of Huntly in a letter to the Dowager referred to Balfour as " your Grace servitour and my guid friend."[23] In February 1560 when the Lords of the Congregation proceeded against certain traitors in their ranks (among whom was Balfour) he managed to elude capture in Fife.[24] Possibly as a reward for these services to the Regent, or as an adjunct to the post of Official, Balfour was in 1560 or earlier presented to the Rectory of Flisk in Fife.[25] For a year or so he disappears from the records.

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[15] Knox, i. 233. According to another account, Balfour had escaped or had secured his release before the Treaty of Boulogne (1550) when all the remaining prisoners were released and this was achieved by abjuring his religion after the intercession of the Queen Dowager and the Cardinal of Lorraine with the French king. Spotswood, i. 177.

[16] The earliest clear identification of Balfour as Official of Lothian is June 1, 1555 (Pitcairn, i. 378*). Spotswood (*History*, i. 177) says that he became Official long before the Treaty of Boulogne (1550). If this is true, it cannot have been very long before the treaty, for Balfour was a prisoner in the galleys in 1548 and probably in part of 1549 (Knox, i. 207, 233); speaking of the period before October 1549 Balfour was not yet an official (*History*, i. 288). There had been an earlier official, Abraham Crichton during part of 1549 (Patrick, *Statutes*) who had a year previously become a lord of session (February 17, 1548: *AS* (1811), 47). Now, it was apparently becoming the practice for officials who became lords of session to demit the former office within a year or so. And there are references to an unnamed Official of Lothian on February 12, 1548/9 (*ADC* (*Public*) 581) and " Officialis Loudonie " on December 28, 1550 (*RPC* i. 111). Crichton, the previous official, being a well-known figure would (as had formerly been the case) be designated by *name* and office: whereas Balfour at this time would be a comparatively unknown man albeit holding a high position in the church courts. Balfour then was probably Official of Lothian by February 1549, certainly not earlier.

[17] Pitcairn, i. 378*.

[18] *Acts of Parliament of Scotland* (hereafter *APS*), ii. 534.

[19] Knox, i. 318.

[20] *Ibid.* i. 399; ii. 44.

[21] *Ibid.* i. 437.

[22] *Ibid.* i. 452.

[23] *Scottish Correspondence of Mary of Lorraine* (Scottish History Society), 432.

Mary, Queen of Scots

After Mary's return from France Balfour began his rise to high judicial and political office. In 1561 he was made an extraordinary lord of the Court of Session, on the spiritual side, in place of the Abbot of Dunfermline.[26] This was Balfour's first civil judicial office. He also appeared among those " also present " at the Privy Council.[27] Two years later, in 1563, he was promoted to an ordinary, or permanent (and paid), place on the bench.[28]

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[24] Knox, ii. 44.

[25] Tenure of this benefice did not mean that Balfour performed the services of priest there; normally an ill-paid vicar did that. After the Reformation, Balfour retained his benefice and the reformed church had to make do with an *ad hoc* minister and teacher in Flisk: *Fasti*, v. 155. The statutes of the church prescribed in 1549 that officials and commissaries and their delegates whatsoever should be priests (*Statutes*, 184); and that benefice holders should be of lawful age and in holy orders (*Statutes*, 111). If these statutes are merely stating the law, then Balfour was almost certainly a priest. Unfortunately the fact that the church had to legislate on these matters suggests that it was designed to curb an abuse: we know that before and after these ordinances many church benefices were held by lay commendators. This legislation may then be regarded as neutral, but for two other references. "Maister James Balfour" is a frequent designation (*e.g.*, Pitcairn, i. 378*; Knox, i. 228, 233), and this is the appellation of a priest or a master of arts, distinguishing "Schir" for a vicar (Patrick, *Statutes*, 88, n. 1). If Balfour was official in 1549 or 1550 (*vide ante*, n. 16) he was probably also a priest and as such probably also in majority. Before then (while in the galleys) he would have had no opportunity to take orders and Knox, who was with him, would have known if he had. Further Knox, referring to Balfour at the time of the siege of St. Andrews Castle, says that he had not yet a cope (Knox, i. 228), *i.e.*, was not yet a priest. Knox was himself a priest and was present and therefore he would be in a position to know. Later Balfour was probably a priest, if Knox is using "cope" so to refer and not merely as Official of Lothian—and that by 1549 or 1550, at the age of twenty-four or twenty-five.

Some commentators state that Balfour was rewarded in 1560 by the Regent Mary for his services in spying against the lords of the Congregation by the grant of the Rectory of Flisk. He was undoubtedly the incumbent in 1561 (BS ii. f. 29; *RPC* i. 188); but there are few earlier references. It is difficult to judge from Knox because the work was written at different times and refers to times before, and often the time when, Balfour could have been appointed. However, a predecessor (and in all probability the immediate predecessor) in the rectory was John Waddel who had been a lord of session and last but one official before Balfour. This reference is on March 19, 1547 (*ADC* (*Public*) 574), which leaves thirteen years unaccounted for, but with no reference to any other person being Rector of Flisk: this seems a reasonable time for Waddel to live a few more years, and die, and a year or so for Balfour to be presented and collated to the Rectory by about 1560. Since he would be presented by the Dowager it would have been done before her death in June 1560 and possibly before her "deposition" earlier in the year.

[26] Books of Sederunt, ii. f. 29. (At this time the Court of Session, following its original institution, contained fifteen ordinary lords: seven lay, and eight (including the Lord President) clerical. There were also "extraordinary" lords, later stabilised at four, two from each estate.)

When the new Commissary Courts were organised at the beginning of 1564[29] to take the place of the pre-Reformation Church Courts (whose jurisdiction had been abolished, but which continued to function to some extent), Balfour, as a former official, was not unnaturally chosen as chief of the four Commissaries of Edinburgh, with a salary of 400 merks.[30] Characteristically, Balfour retained his position and salary as a senator of the College of Justice.[31] In the same year he received a grant of £10 from the Church of Kilgour.[32]

At first Mary had accepted the Reformation settlement and with the assistance of Secretary Lethington and her half-brother, the Earl of Moray, followed a middle course in religion and politics. But by the beginning of 1565 the influence of Moray was declining; the Darnley match was under way; and Mary adopted a more Catholic policy. Moray revolted against these assaults on Protestantism but got little support from the Protestants. At this point Balfour entered active political life. By 1565 he was a Privy Councillor, at first in July as one of the " *extraordinarii* "[33] and from September onwards as a regular councillor in a very Catholic council.[34] This rise to power coincides with the return to Scotland of Bothwell[35] in the autumn. Thenceforth Balfour and Rizzio were most potent in the Queen's counsels; Balfour was being relied on by the Queen more than any other,[36] and he was able to give full rein to his violent, cruel and unscrupulous nature. He harangued the citizens of Edinburgh, trying to induce them to agree to a tax of £1,000 a month for a royal army [37] to be used against Moray and the Protestants. At the same time he is bruited as future Secretary [38]; and may have acted as Secretary for a while either alone or with Rizzio.[39] He was described as one of no religion and as flinging at all men as though he were mad.[40] He was with the Queen and Council during the Chaseabout Raid of 1565, "*in exercitu*" at Castlehill, and at Dumfries.[41]

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[27] *Register of Privy Council* (hereafter *RPC*), i. 188.

[28] Books of Sederunt, ii. f. 83.

[29] *RPC*, i. 252.

[30] *Practicks* (1754), 670; *Register of Secret Seal* (hereafter *RSS*), v. 1633.

[31] He was one of the few commissaries to do so; such judicial pluralism was criticised in Parliament. *APS*. iii. 41.

[32] *Treasurer's Accounts* (hereafter *TA*), xi. 294.

[33] *RPC*, i. 340.

[34] *Ibid*. i. 367 *et seq*.

[35] Keith, *History* (Spotswood Society), ii. 618.

[36] Knox, i. 206, ii. 502; *CSPSc*, ii. 211, 218, 236, 250; Teulet *Papiers d'Etat* (Bannatyne Club), ii. 82, 106, 107; *CSPFor*, vii. 480, 482, 499, 512.

While he was thus rising to power, his relatives received grants of escheats of the estates of the rebels [42]; and one brother was made master of the household.[43] Probably his new duties interfered with his work as chief commissary from which he resigned in October.[44] It may have been about this time that he married Margaret Balfour the only child of Michael Balfour of Burleigh.[45] His father-in-law received a grant of lands in Fife (formerly held in feu-farm), and of the hereditary coronership of the county.[46] Balfour himself would then be about thirty-nine and his wife in her teens. His new duties included assisting the prosecution of those who failed to abide the recent raid of

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[37] Knox, ii. 502.

[38] Teulet, ii. 82, 106, 107; *CSPSc*, ii. 211.

[39] *Ibid.* ii. 250; *CSPFor*, viii. 184.

[40] *CSPFor*, vii. 506.

[41] *RPC*, i. 379, 380.

[42] *RSS*, v. 2352, 2462, 2463.

[43] *Ibid.* v. 2463; Haddington, ii. 268.

[44] *RSS*. v. 2396.

[45] Balfour's wife (Dame Margaret Balfour of Burlie) is mentioned, although not by name, in March 1566 (*Salisbury MSS*, i. 335). I think we can assume that, as a celibate priest and an ecclesiastical judge, he did not marry before the Reformation of 1560. We know that Balfour's eldest son Michael (who died in 1619) was not of age in 1569 but was of age in 1590: unfortunately this gives an even wider margin for the date of the marriage, namely 1548 to 1569. Since Dame Margaret was the heiress of Burlie it is less likely that the marriage took place near 1560 when Balfour was a mere rector and an ex-official of a discredited church; whereas in 1566 he was an ordinary lord of session, chief commissary and a privy councillor and shortly to become Clerk Register and a knight. Apart from these paid offices he was receiving grants and escheats of the goods of rebels. He probably also had the backing of Bothwell; and at the end of 1565 he was the Queen's chief and most extreme adviser. A date in 1566 would accord with grants to his father-in-law of lands and of the hereditary coronership of Fife in June 1566 (*RMS*, iv. 1736; *APS*, ii. 561).

[46] *RSS*, v. 2903; *Register Magni Sigillii* (hereafter *RMS*), iv. 1736; *APS*, ii. 561.

Stirling.[47] In 1566 he continued to receive substantial grants of money, including the fruits of the parish of Kilgour which had belonged to Moray.[48]

Early in 1566 it had become essential to Moray and the other rebels in exile that they should effect a *coup d'état* in order to prevent their imminent forfeiture in the forthcoming parliament. The principal enemies of the conspirators were Rizzio and Balfour; their chief ally was the King, who resented his exclusion from political power. The conspirators had intended to hang Balfour, but fortunately for him the King had permitted him to retire from court.[49] In the disturbances in Edinburgh after the assassination, when for a time the conspirators were in control, Balfour remained in hiding.[50] His wife was ejected from her house, and the house was looted.[51] Not unnaturally Balfour counselled the Queen to pursue the murderers with all cruelty, hanging suspects.[52] He was used as an emissary to try to win over some of the assassins from the rest.[53]

His support was rewarded with the valuable office of Clerk Register in place of James McGill,[54] who had been forfeited for his part in Rizzio's death, together with McGill's escheat *gratis*[55]; and he was knighted in the style of Sir James Balfour of Pittendreich.[56] At this time he alleged that he was a Lutheran.[57]

Balfour's legal experience was utilised by the Queen when she appointed him to a parliamentary commission to revise the laws.[58] The result of the commission's labours was the compilation of statutes known as the *Black Acts* in the preface to which Balfour's work is commended.[59]

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[47] Pitcairn, i. 472*.

[48] *TA*, xi. 494, 523; *RSS*, v. 2579.

[49] *Salisbury MSS* (HMC), i. 344; Keith, ii. 417, 418; iii. 272; Melville, *Memoirs* (Bannatyne Club), 149; Teulet, ii. 114.

[50] *Salisbury*, i. 335, 344.

[51] *Ibid.* i. 334, 335.

[52] Knox, ii. 524–525.

[53] *CSPSc*, ii. 269–270.

[54] *RPC*, i. 436, 438; *RSS*, v. 2705; *Salisbury*, i. 335.

[55] *RSS*, v. 2725.

[56] *Ibid.* v. 2705.

[57] Knox, i. 202.

[58] *APS*, i. 29 *et seq.*

[59] This appointment and a similar one in 1574 no doubt afforded him much material and experience for his later *Practicks*: *APS*, iii. 89.

The time spent on the *Black Acts*—May to October 1566—coincides with Balfour's inactivity in political affairs. Certainly by the time of the birth of Prince James (June 19, 1566) the Queen's reliance on him had diminished and was being transferred to John Leslie, Bishop of Ross.[60] But in June Balfour did appear as a privy councillor at the General Assembly[61] and took part in council business. He also executed his functions as Clerk Register and as a Lord of Session.

By October he was active again as a henchman of the Earl of Bothwell, whose immediate aim was the removal of King Henry. Common rumour had it that at about the time of the Craigmillar conference[62] Balfour drew the band for the murder of the King; and two confessions (probably extracted under torture) testified that he also signed the band.[63] He had the custody of the band by virtue of his friendship with Bothwell and as Clerk Register and later as captain of Edinburgh Castle (where the records were kept).[64] He said later that Mary had asked him to kill Darnley. As these preparations went on he was carrying out his administrative duties—on a commission dealing with the ministers' sustentation[65] and as auditor of accounts.[66]

Balfour's full part in the death of Darnley (which took place in February 1567) can never be known completely.[67] He was regarded as the principal counsellor and deviser of the plot.[68] The deed took place at Kirk o' Field, part of the Provostry of Kirk o' Field which had formerly belonged to Balfour[69] but which he had recently transferred to his brother, Robert.[70] Balfour helped Bothwell to prepare the place for the King's arrival and indeed induced the King to go there rather than to the far more suitable Craigmillar.[71] When a servant of the Queen found the two conspirators in a *tête-à-tête*, they said that they had had no sleep because they had spent the previous night looking for a suitable entry to the King's chamber.[72] The servant was worried by what was going on: the Queen suggested that he should seek consolation from that witty man Balfour as she had often done.[73] Balfour bought the gunpowder for the explosion [74] and handed it over to one of Bothwell's servants on the night of the murder [75] and he also tampered with the locks. His brother, Robert, muffled in a cloak was present at the death.[76] Later that night Balfour himself left Edinburgh to establish an alibi and returned secretly three days later.[77]

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[60] *CSPFor*, viii. 91; *CSPSc*, ii. 288–289.

[61] Calderwood, *History* (Woodrow Society), ii. 321.

[62] November 1566: *CSPSc*, ii. 597–600.

[63] Pitcairn, i. 511*, 512*; *CSPFor*, viii. 393; *cf.* Labanoff *Receiul*, v. 137; Nau, 48.

[64] *Calendar of State Papers, Elizabeth, Spanish* (hereafter *CSPSp*), i. 673.

[65] *RPC* i. 497.

[66] *Thirds of Benefices* (Scottish History Society), 189.

[67] Much of the evidence derives from confessions under torture or scaffold speeches of minor participants, from common rumour and from the reports of contemporaries who could not have had first hand information. However, Balfour himself, while admitting to some part in the assassination of the Regent Lennox, also conceded that there was a prima facie case against him in relation to Darnley's death: *CSPSc*, iv. 460–462.

[68] Pitcairn, i. 500*.

[69] Knox, ii. 549; *Thirds of Benefices*, 278.

The people were unanimous in accusing Mary, Bothwell and their adherents (including Balfour) of responsibility for Darnley's death. The "reward" notices of the Government which offered £2,000 for information about the assassination were soon answered by placards displayed in Edinburgh. These pointed to Balfour, amongst others, as being implicated.[78] A servant of Balfour, who had been a witness to the assassination, was later murdered to stop his mouth and buried secretly.[79] Balfour retracted a previous offer to clear himself.[80] When he returned to Edinburgh shortly after Darnley's death he had to have a guard of thirty horsemen; and two months later he considered it prudent to keep to his house because he was a man hateful to the people.[81] Eventually, as a result of these suspicions

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[70] *RSS*, v. 3123.

[71] *CSPSc*, ii. 320, 321; Nau, 33.

[72] Pitcairn, i. 507*, 509*.

[73] *Ibid.* i. 509*.

[74] *CSPFor*, viii. 182.

[75] Pitcairn, i. 511*.

[76] Calderwood, viii. 211.

[77] *CSPFor*, viii. 182, 264.

[78] *RPC*, i. 498; Keith, ii. 519; Nau, 34; *CSPSc*, ii. 320, 321.

[79] *CSPFor*, viii. 211.

[80] HMC., vi. 642. Later in life he declared he was innocent. *CSPFor*, viii. 182.

[81] *Ibid.* viii. 182, 211.

Balfour was arrested by Moray and warded in Edinburgh Castle[82]; but his confinement was brief, for a fortnight later he was making an inventory for Mary of the munitions there on the instructions of the Queen.[83]

The placards, however, continued to appear, accusing *inter alios* Bothwell and Balfour. The Queen agreed to a trial of Bothwell (but not Balfour)[84]; and a Draconian edict was promulgated against the placards.[85]

Although in the proceedings against Bothwell, the Earl of Lennox (father of Darnley) accused both Balfour and Bothwell,[86] Balfour's name did not appear in the indictment,[87] and Bothwell after a farcical trial was acquitted.[88] Thereafter, when he challenged anyone to accuse him, more placards appeared naming him and Balfour.[89] Despite these suspicions Balfour appeared at the Parliament of April and served on the committee dealing with the manner of holding Parliament.[90] Balfour continued to assist Bothwell, whose next aim was marriage with the Queen. The nobles were concussed into subscribing a band supporting this policy—the Ainslie band.[91] Balfour was made captain of Edinburgh Castle[92]; and Bothwell "abducted" Mary, taking her to Dunbar.[93]

By late April things were moving towards a crisis. Bothwell brought the Queen back to Edinburgh. In the few days before the marriage, much happened. The Queen granted Bothwell and others a remission for their part in abducting her and for all other crimes whatsoever—a formula wide enough to cover the murder of Darnley. Balfour inserted his own and his brothers' names in Bothwell's remission.[94]

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[82] *Ibid.* viii. 184.

[83] *Mar & Kellie* (HMC.), ii. 21.

[84] *RPC*, i. 504.

[85] This edict, which was probably the work of Balfour, followed the words of the Roman edict *de famosis libellis*: Spotswood, ii. 48; Calderwood, ii. 348.

[86] *CSPSc*, ii. 319, 320, 321.

[87] Pitcairn, i. 489*.

[88] Spotswood, ii. 541.

[89] *CSPSc*, ii. 320, 321.

[90] *APS*, ii. 545. His father-in-law was made hereditary coroner of Fife: *ibid.* ii. 561.

[91] Keith, ii. 563.

[92] Pitcairn, i. 479*; *CSPFor*, viii. 223; Keith, ii. 618; *Diurnal of Remarkable Occurents* (Bannatyne Club), 111.

[93] Bothwell's divorce was hurried through. Balfour, being no longer Chief Commissary, was not concerned in this but he probably drafted Mary's (public) marriage contract, and it was registered by his order as Clerk Register: Labanoff, i. 23.

Bothwell seems to have regretted his choice of captain because jealousies arose between them,[95] possibly connected with Bothwell's alleged attempt to kill Lethington[96] but more probably because Balfour did not think himself sufficiently rewarded for helping in the removal of Darnley.[97] Bothwell tried to get rid of Balfour; Balfour was proposed as the ambassador to England to announce Mary's wedding[98]; and there was an attempt to insinuate another captain in the castle[99]; but Balfour refused to budge.

Fall of Mary

As long as Bothwell retained control of the Queen and of the Castles of Dunbar and Edinburgh he was very powerful. But he could not trust Balfour. He had now been warned by the growing faction against Bothwell that he would be accounted art and part of Darnley's murder if he continued to support Bothwell.[1] When safeguards for his life were also given the offer was too tempting to be rejected. A fortnight after Mary's marriage he joined with the lords in a band to relieve the Queen of Bothwell's thraldom.[2] Balfour held on to the captaincy of the castle as security,[3] removing those who favoured the Queen.[4] Meanwhile he and a servant were made citizens of Edinburgh *gratis*.[5]

The Queen did not realise the extent of his treachery, because she did not think that one whom she had raised from slavery and indigence could exhibit such ingratitude.[6] In the remaining weeks of her reign she sent a series of envoys and messages imploring him to retain the castle in her interest and to prevent the insurgent lords from entering Edinburgh[7]—which they would not have dared to do without the assurance of Balfour's benevolent neutrality.[8] The city authorities made only a token defence against the lords.[9] Balfour in the castle did not fire on the lords[10]; he gave Huntly and the Primate refuge[11]; and he merely transmitted Mary's order to the lords that they must retire out of Edinburgh.[12] The greatest treachery was yet to come. Prompted by the lords, he informed Mary that if she marched on Edinburgh from Dunbar he would support her by firing on the lords; but if she failed to do so, he would come to terms.[13] Mary marched to defeat and capture at Carberry Hill. Balfour did nothing in support; he let out the Primate and Huntly by the postern gate[14]; he treated Mary's latest appeals coldly[15]; and he continued negotiating secretly with the lords.[16] The lords no doubt pointed out to Balfour that the confession the day before of Captain Cullen (one of several minor participants in Darnley's death who were brought to trial) had implicated him.[17] The basis of a bargain was present: the lords would receive the castle and Balfour would be given a pardon and a promise of his life, guaranteed by the captain designate, Kirkcaldy of Grange.[18] No wonder Mary and two of her supporters were at one in regarding him as a true traitor.[19]

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[94] *RSS*, v. 3511, 3512; M. Laing, *History*, ii. 88; Pitcairn, i. 500*; Spotswood, ii. 52. In the Register of the Secret Seal there appear remissions in these terms to two minor participants dated May 10, 1567; thereafter there is a large gap: MS. RSS, xxxvi, ff. 99–108.

[95] Melville, 179; Maitland, *Apologie* (Scottish History Society) *Miscellany*, ii. 222.

[96] Melville, 178.

[97] Calderwood, ii. 361; Keith, ii. 618.

[98] *CSPFor*, viii, 233.

[99] Melville, 180.

[1] *Ibid.* 180–181.

[2] HMC, ii. 183.

[3] *CSPFor*, viii. 264.

[4] Calderwood, ii. 362.

[5] *Edinburgh Accounts* (Burgh Record Society), ii. 231.

Meanwhile, as Mary was being taken to captivity at

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[6] *Haddington*, ii. 268, 277.
[7] Laing, ii. 106–109, 114.
[8] *Ibid.* ii. 114; *CSPSp.* i. 673.
[9] Laing, ii. 106; Knox, ii. 562.
[10] Laing, ii. 107.
[11] *CSPSc*, viii. 249; Knox, ii. 557.
[12] Laing, ii. 106.
[13] Nau, 43–44; *CSPSp*, i. 673.
[14] Laing, ii. 115; Calderwood, ii. 362.
[15] Laing, ii. 109.
[16] *Ibid.* ii. 114; Calderwood, iii. 362; Nau, 44; Knox, ii. 562; *CSPFor*, viii. 252
[17] *CSPFor*, viii. 252.
[18] Melville, 180.
[19] *Haddington*, ii. 268–277; Nau, 44; *CSPSc*, ii. 335.

Lochleven, she sent a message to Balfour imploring him to keep the castle for her [20]; but Balfour was now one of the lords, sitting in council with them,[21] writing letters to England justifying their action,[22] and to the Primate trying to win him over with assurances of personal safety.[23] The incriminating evidence of the Darnley murder band (which both Lethington and Balfour had signed [24]) was disposed of. Balfour handed it over to Lethington and he burnt it. Thereafter, at Bothwell's request, he gave out the remaining Casket letters to a servant of Bothwell; but at the same time he informed the lords who intercepted the papers.[25] He also gave the lords artillery from the castle.[26]

Regency of Moray

Balfour had no intention of surrendering the captaincy of the Castle until the future government of Scotland had been settled and was in a position to redeem promises made to him.[27] In June Mary abdicated and her half-brother Moray became Regent; but Moray did not return from France till August. Until then Balfour continued to sit daily with the lords [28] and was with them in interviews with the English representative [29] and in other business.[30] The Hamilton faction used Balfour as an intermediary for their accession to the Regent.[31] To strengthen his position Balfour entered into a band with the magistrates for the defence of Edinburgh.[32] He also warded a Hepburn who was trying to levy troops for Bothwell. On one occasion when the English representative was again trying to force the lords into granting him an interview with the captive Queen, Balfour arrived (by arrangement) and on some excuse broke up the meeting.[33]

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[20] Laing, ii. 114.
[21] *CSPSc*, ii, 335.
[22] *Ibid.* ii. 335.
[23] Pitcairn, i. 511*, 512*; *Hamilton*, ii. 2–3.
[24] Diurnal, 111; *CSPSc*, iv. 394; *CSPFor*, ix. 354.
[25] *RPC*, i. 641; Laing, ii. 90; Knox, ii. 562; Calderwood, iii. 367; *CSPSc*, ii. 730.
[26] Diurnal, 116; *CSPFor*, viii. 261; ix. 354–355.
[27] *CSPFor*, viii. 264.
[28] *Ibid.* viii. 261; *CSPSc*. ii. 343.
[29] *CSPSc*, ii. 350, 353, 355.
[30] *Illustrations of Reign of Queen Mary* (Bannatyne Club), 195.
[31] *CSPSc*, ii. 356.
[32] *Edinburgh Burgh Records* (Scottish Burgh Records Society), iii. 237; Keith, ii. 664.

Balfour attended a reception given by the French representative on Moray's return [34] and he agreed to surrender the castle on "good composition." [35] He went with the lords to Lochleven where they had the last conference with the Queen.[36] A week later Moray was proclaimed Regent.

The new Regent now had to pay blackmail to Balfour. Moray granted him a bond of maintenance whereby Balfour, the principal counsellor and deviser of Darnley's assassination, was to use his good offices to pursue the murderers.[37] The captaincy of the castle was to be given to Kirkcaldy of Grange.[38] In exchange Moray agreed to grant Balfour a remission for any crimes; make over the Priory of Pittenweem; pay a pension out of the Priory of St. Andrews for his son; and give Balfour a lump sum of £5,000.[39] Moray then slept in the castle to show his authority.[40] Shortly afterwards these grants were made.[41] Balfour also agreed to surrender the office of Clerk Register to the former incumbent, McGill, in exchange for the Lord Presidency of the Court of Session. The latter part of this bargain was effected in December, the then President being supplanted by a quirk.[42] Also in December, he appeared in Parliament and among the lords of the articles as Prior of Pittenweem[43]; and he signed the order justifying the action of the lords against Mary.[44]

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[33] *CSPSc*, ii. 376.

[34] *Ibid.* ii. 381.

[35] *Ibid.* ii. 383.

[36] Keith, ii. 734. As he entered a sudden gust of wind threw open the windows. Mary remarked that it must be for an archtraitor. With a very red face Balfour hid behind the other lords, Nau: 77.

[37] HMC, vi. 642.

[38] *CSPSc*, ii. 383.

[39] *Historie of James the Sext* (Bannatyne Club) 18; Keith, ii. 755; HMC, vi. 646; *Diurnal*, 120; Calderwood, iii. 387.

[40] Keith, ii. 755; *CSPSc*, ii. 388; *Diurnal*, 120.

[41] Laing, *Charters* 841; *RMS*, iv. 1850; MS RSS, xxxvii. 20. The payments came out of Moray's own property, and were at his death listed among his debts. HMC, vi. 646.

[42] Pitmedden, MS Abridgement, i. 180; *CSPSc*, ii. 350, 375.

Although the scaffold speech of John Hepburn implicated Balfour of complicity in Darnley's death,[45] his position was unaffected. In May he supported the Regent against Mary when she escaped from Lochleven.[45a] He appeared in arms—to some effect—against her at Langside.[46] Although he was regarded as being in favour of the Queen, like others, he kept the Regent's company.[47] He did not sign the band in favour of Mary's restoration made before Langside,[48] nor did he in August join the Marians in writing to Elizabeth.[49] Yet, the association of Moray with so notorious a member of the Darnley assassins was costing him much support.[50] Nevertheless, in exchange for a payment of £2,000 from Balfour, Moray granted further Fife lands to his son Michael.[51] Throughout the remainder of 1568 and the first part of 1569, while Moray was in England, Balfour exercised his functions in Parliament[52] and as a councillor, Lord President[53] and auditor of Exchequer[54]; and was on a commission to travail for pacification of the Marians[55]—but with more than a suspicion that he was keeping his hand in with Mary.[56]

However, in the Convention which was held at Perth in July 1569 Balfour was in the minority of nine to forty who favoured Mary's divorce from Bothwell and her restoration.[57] In September another scaffold speech implicated

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[43] *APS*, iii. 3, 46.

[44] *CSPSc*, ii. 398.

[45] Calderwood, iii. 401; *CSPFor*, viii. 393.

[45a] However there are hints that with Lethington, Balfour was a prime mover in Mary's escape: Spotswood, ii. 84–85.

[46] *CSPSc*, ii. 405; Melville, 202.

[47] Herries, *Historie* (Abbotsford Club), 101.

[48] *CSPSc*, ii. 403–404.

[49] *CSPSc*, ii. 488.

[50] *CSPFor*, viii. 497; Melville, 220–221.

[51] Laing, *Charters*, 841. The grants to Michael were confirmed by the Crown *gratis*. *RMS*, iv. 1850.

[52] *APS*, iii. 49–55.

[53] *RPC*, i. 633, 654.

[54] *Exchequer Rolls*, xix. 331, 374; xx. 27.

[55] *RPC*, i. 645.

[56] *CSPSc*, ii. 513, 577, 674; *RPC*, ii. 27.

[57] *RPC*, ii. 1, 8; *CSPSc*, ii. 663, 667; *CSPFor*, ix. 107.

Balfour as the principal counsellor and deviser of the assassination.[58] At the insistence of Lennox (father of the murdered King), and after acrimonious debate in the council, the Government decided to go against Lethington and Balfour.[59] Lethington was warded in Edinburgh.[60] A party of horse was sent to Fife, and Balfour and his brother Gilbert were brought back under arrest, ostensibly for seditious correspondence with Mary.[61] Shortly after he was warded in Stirling and almost immediately in free ward in St. Andrews on caution of £20,000 not to practise with England.[62] His early release was due to the intervention of the Regent or by bribery of the Regent's Secretary, Wood, with great sums of gold.[63] Possibly he secured his release by agreeing to be a witness against Lethington,[64] but Lethington had just been freed from prison and carried off into Edinburgh Castle by Grange.[65] Throughout all these proceedings Balfour remained Lord President. He was so acting also until 1569 at least, and retained the title till 1571.[66] Some time after his arrest he regarded Mary's case as hopeless, seeing no likelihood of aid for her from France or England.[67]

Regency of Lennox

Balfour might have reasonably expected to live out his life unmolested but for the assassination in January 1570 of his protector, the Regent Moray. The murder was perpetrated by a member of the Hamilton family with whom Balfour appears to have maintained some association. With the elevation of the new Regent, Balfour might expect short shrift, for he was the Earl of Lennox, father of Darnley and

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[58] Pitcairn, i. 511*.

[59] *CSPFor*, ix. 120, 121; *Diurnal*, 147–148.

[60] Calderwood, iii. 505; *Diurnal*, 147; *CSPSc*, ii. 673.

[61] *CSPSc*, ii. 674; *Diurnal*, 148; Herries, 117; Calderwood, ii. 505.

[62] *RPC*, ii. 27; *Diurnal*, 149; Melville, 221.

[63] *Ibid.* 221; Herries, 117–118; *CSPSc*, iii. 21; Calderwood, ii. 505.

[64] *CSPSc*, iii, 21, 26–27.

[65] Melville, 220; *CSPFor*, ix. 355.

[66] *Notes & Queries* (N.S.), v. 6; *cf. CSPSc*, iv. 462.

[67] Melville, 237.

Balfour's former accuser, as well as the hereditary enemy of the Hamiltons. At first, however, Balfour swore to the English representative that they would support Lennox.[68] But in a few weeks, in violation of his many oaths of loyalty to the King's Government,[69] he had joined the Marians and for two years was the most extreme partisan of the Queen, his cruelties exciting the violent denunciations of his opponents.[70] By March he was one of the Marians who wrote to Elizabeth.[71] Certainly by May he had joined the rebel forces at Linlithgow[72] from where they made a fruitless dash to Edinburgh.[73] In the summer he was in Aberdeen with rebels under Huntly[74]; then in Fife trying to concuss the lieges into boycotting the loyalist Convention; then in Edinburgh.[75] In Fife he just escaped the clutches of Lindsay's force which went after the rebels.[76] In July he was at Brechin and Forfar when the Queen was proclaimed by the rebels.[77] Thereafter Balfour was moving about between Angus and Fife where he and Grange began to make fortifications.[78] Back at Brechin he was one of the rebels who were helping Huntly to oppress the King's subjects[79]—until the terrible[80] Morton rushed north with the men of Fife.[81] The news of Morton's approach dispersed the rebel leaders who fled in all directions,[82] Huntly to the hills,[83] Balfour to Aberdeen.[84]

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[68] *CSPFor*, ix. 178.

[69] *Ibid*. x. 210.

[70] Calderwood, iii. 255–259; Bannatyne, 300; *Edinburgh Burgh Records*, iv. 35.

[71] It *is* possible that his signature was forged: Calderwood, iii. 550.

[72] *Ibid*. iii. 256.

[73] *Ibid*. iii. 561.

[74] *CSPSc*, iii. 219.

[75] *Ibid*. iii. 257.

[76] *Ibid*, ii. 265, 271.

[77] *Ibid*. iii. 301.

[78] *Ibid*. iii. 285.

[79] *Ibid*. iii. 296.

[80] Well they might flee, for Morton stormed Brechin and hanged thirty-four of the garrison: *CSPFor*, ix. 320.

[81] *CSPSc*, iii. 301.

[82] *CSPFor*, ix. 320.

[83] *CSPSc*, iii. 315, 316.

[84] *Ibid*. iii. 303. Before Balfour left he fortified the garrison in their defence by showing them a letter of Huntly purporting to promise their relief: Balfour had forged the letter: Calderwood, iii. 7–8; viii. 187; Herries 129–130.

While Morton was dealing with Brechin (or just after), Balfour was at a merry banquet in Edinburgh where he hinted to the English representative that great things would happen before he was twelve days older.[85] There was talk of Balfour's imminent departure for Flanders[86] but he was back with the rebels at a Convention at Dunkeld in September.[87]

For a few months Balfour disappears from sight only to re-emerge in January 1571 when he came secretly at night to Edinburgh Castle.[88] There, he and his former comrades, Secretary Lethington[89] and Grange, were still holding the Castle in Mary's interest until 1573.[90] The number of Castilians was increased by pro-Catholic and anti-English elements.[91] In March Balfour was at his favourite game of taunting the ministers; he wrote a series of libels against John Knox.[92] In May the rebels (including Balfour) occupied Edinburgh.[93] When a deputation of ministers visited the castle with a view to arranging a peace,[94] Balfour was still addressed as Lord President. He justified his rebellion against the King's authority and went on to discourse on "void" and "voidable" in relation to the legislation of 1568.[95] Next month, after the Queen had been proclaimed in Edinburgh, Balfour and the Bishop of Galloway went down to try to coerce the kirk session into praying for the Queen.[96]

Regency of Morton

The Government decided to go against the rebels and in August the Hamiltons and the Balfours were forfeited.[97]

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[85] *CSPSc*, iii. 315.

[86] *Ibid.* iii. 324.

[87] *Ibid.* iii. 340.

[88] *CSPFor*, ix. 393.

[89] Deprived of Secretaryship, August 25, 1570; *RPC*, xiv. 72.

[90] Pitcairn, i. 34; *CSPSc*, iv. 129, 231.

[91] Among the soldiers was a nephew of Balfour who had been a member of the French Archer Guard: *ibid.* v. 182–183.

[92] Calderwood, iii. 52.

[93] Herries, 139; Calderwood, iii. 72–73.

[94] *CSPFor*, ix. 448.

[95] Calderwood, iii. 79–87; *CSPFor*, ix. 448.

[96] Calderwood, iii. 97.

[97] *RPC*, ii. 114, 148n; *CSPSc*, iii. 668–669; *Notes & Queries* (N.S.), v. 6; Herries, 139.

Unless the Marians had some likelihood of winning the civil war Balfour's hopes of retaining his lands were very slender. Succeeding events made some sort of accommodation with the King's forces not only possible but, for Balfour, essential. The murder of the Regent Lennox (in which Balfour had no small part [98]) removed the personal quarrel between Balfour and the Government; and the succeeding Regent Mar began regranting Balfour's lands.[99] Further, the chances of the Marians winning the war became less as the Regent and Morton prosecuted it more resolutely. Scope for accommodation existed in the policy of Morton who wanted to win over as many rebels as possible and to crush the obdurate. The great attraction which he held out to the guilty men was immunity from prosecutions for their part in Darnley's death or in resisting the King's authority.[100] Thus assured, Balfour, the most extreme of the Marians, had secret dealings with Morton revealing to him the plans of the Castilians.[1] Negotiations between the two sides, with Balfour as a representative of the Castilians, continued throughout 1572.[2] In April Balfour had gone back on his word, but the parleys came to fruition in November when Morton himself became Regent. By the new year only a few points of dispute remained.[3] When these were settled Balfour received a remission for crimes of which (he declared) he was innocent [4]; his forfeiture of 1571 was reduced; and he declared his profession of the true religion.[5] With the assistance of the English representative Morton used Balfour (now at Perth) to bring in most of the rebels and arrange a pacification of the strife which was ruining Scotland.[6] Balfour went beyond his brief and betrayed the correspondence between the Castilians and Mary[7]; intercepted a French subsidy destined for the rebels[8] and used it to buy his remission.[9] Balfour induced Huntly, the chief but irresolute Catholic noble, to make peace with Morton.[10] Almost immediately Balfour was granting lands in Pittenweem.[11] Despite the clamour against Morton's use of Balfour,[12] and despite the petitions to Morton against the employment of Balfour,[13] he was allowed to work towards the Pacification[14] which was agreed at the end of February.[15] In a letter to Killigrew, he makes rather veiled threats of his power over Morton and others.[16] The Pacification was ratified in Parliament and Balfour and Huntly were formally restored to their lands and titles. To the world he justified his original adherence to the Marians because they were supported by the majority of the nobles[17]; and justified his desertion of them on the ground that they were planning to bring in strangers.[18] Morton recognised his work in the Pacification[19] and the English representative suggested a pension of £100 sterling for him.[20] With the help of English troops Edinburgh Castle was reduced. Balfour's former comrades suffered death: Grange by hanging, Lethington by his own hand.

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[98] *CSPSc*, iii. 699–700; iv. 460–462; Calderwood, iii. 257.

[99] MS RSS, xl. 32.

[100] *CSPFor*, x. 237. Balfour had no objection to standing trial for his part in Darnley's death and in the deaths of the Regents; he only sought a delay of a few years so that he might be assured of a fair trial in a peaceful country: *CSPSc*, iv. 462.

[1] *Ibid.* iv. 195.

[2] *Ibid.* iv. 202–207, 383, 430, 436; *CPSFor*, x. 67.

[3] *CSPSc*, iv. 455; *CSPFor*, x. 232.

[4] *CSPSc*, iv. 461.

[5] *RPC*, ii. 174; iii. 625; *CSPSc*, iv. 482, 490, 533; Bannatyne 297; *CSPFor*, x. 242.

Although Balfour did not have all his own way,[21] he remained active for a time, esteemed by the Regent, more than men of greater calling.[22] Certainly the ministers and burgesses of Edinburgh did not love him, but despite further incriminating scaffold speeches,[23] he took a place in Parliament as Prior of Pittenweem and served on committees to revise the law and consider church policy[24]; and he was on a commission of arbiters to settle disputes between certain Johnstones.[25]

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[6] *CSPSc*, iv. 459, 460, 492, 493.

[7] *CSPFor*, x. 258.

[8] *Ibid.* x. 251.

[9] *CSPSc*, iv. 490; Bannatyne, 297–298.

[10] *CSPSc*, iv. 460, 492; *CSPFor*, x. 258.

[11] *RMS*, iv. 2490.

[12] Spotswood, ii. 197.

[13] "No tongue can expresse the wickedness of that man and his brother": Calderwood, iii. 255; Bannatyne, 300.

[14] *CSPSc*, iv. 461; *CSPFor*, x. 251.

[15] *RPC*, ii. 193–201; *CSPSc*, iv. 495–498.

[16] *Ibid.* iv. 461.

[17] *Ibid.* iv. 401.

[18] *Ibid.* iv. 512.

[19] *Ibid.* iv. 492, 493.

[20] *Ibid.* iv. 518, 519.

[21] He failed to get an unfavourable decree of session reversed in terms of the Pacification of Perth: *RPC*, ii. 250.

In mid-1575 the reports are conflicting. He is petitioned against by the magistrates of Edinburgh who objected to his presence on a commission to deal with the bullion—because of the injuries done by him to the town.[26] He is referred to as a Papist and pensioner of France but he is also noted as being relied upon by Morton and being preferred with Borthwick "to places of justices."[27] Again, his friendship with Morton was of little weight—his only function was to contrary the citizens of Edinburgh and the ministers twice a year—presumably at the Assembly.[28] He failed to have the Regent write to the King of Sweden on behalf of his brother Gilbert (a former adherent of Bothwell) who was imprisoned in Sweden.[29] He certainly was not banished out of the realm although he may have been from court. In 1577 he was suggesting to Mary his services against Morton in return for a pardon but Mary still distrusted him.[30] It is more likely that his studies took him home, and that he was at his Fife estates working on his *Practicks*. This collection of law from many sources was described by Lord President Inglis in a case in 1861 as "a work of undoubted authority." Besides its intrinsic worth it is valuable as a source of judicial records no longer extant.[31]

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[22] *Hamilton Papers*, ii. 634.

[23] Pitcairn, i. 512; Mothe Fénélon, *Correspondance Diplomatique* (Bannatyne Club), vi. 5; Spotswood, ii. 197.

[24] *APS*, iii. 84, 89.

[25] *RPC*, ii. 422.

[26] *Edinburgh Burgh Records*, iv. 35.

[27] *CSPSc*, v. 115, 119.

[28] Murdin, *State Papers*, 283; *CSPSc*, v. 180.

[29] *Loc. cit.*

[30] *CSPSc*, v. 248; Labanoff, v. 158.

[31] Hector McKechnie, "Balfour's *Practicks*" in (1931) *Juridical Review*, XLIII, 179.

There are only scattered references to Balfour throughout the remainder of Morton's regency. Once he was in conference with the Regent and Ogilvie.[32] He apparently found it necessary to sell parts of his priory lands.[33] His father-in-law died in November 1577 and the lands went to his heir, Michael, son of Balfour.[34]

Exile

Probably Morton and Balfour had a hold over each other and neither would go to extremes especially when there were rumblings of a Catholic revolution against Morton. In March 1578 Morton fell, but for a year or so managed to continue in power by keeping control of the person of the King. During that period Balfour was first trying to remain in friendship with Morton and then was joining up with the Catholics and malcontents.[35] In May 1579 Morton hit back by proceeding against him and the Hamiltons. Balfour's case was desperate: he moved quietly north intending to pass to France[36] which he did at the end of May,[37] just as the Government ordered him to surrender his houses and the Treasurer started intromitting with his goods.[38] The Government relied on Balfour's forfeiture of 1571 for these actions.[39] *Ob majorem cautelam* the forfeiture was renewed in November[40] and a few days later the King and council granted out Balfour's Priory and Burleigh lands which had reverted to the Crown.[41] Other grants were made early in 1580.[42]

Balfour, who was now over fifty, had gone to France and joined the Hamilton exiles in Paris.[43] Almost as soon as he left Scotland he was in correspondence with the captive Mary. There was a plan for a French *coup d'état* against Morton and for the restoration of Mary.[44] Mary wanted Balfour to send her the Darnley murder band; he sent her an attested copy of the later Ainslie band.[45] But Mary remained quite distrustful of Balfour and only worked with him because of necessity. In about August there was a meeting in France of the chief conspirators: Esmé Stewart, Archbishop of Glasgow, Bishop of Ross, Duke of Guise and Balfour.[46] Stewart was sent to Scotland but had arrived too late to prevent Balfour's forfeiture.[47]

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[32] *CSPSc*, v. 247.

[33] *RMS*, iv. 2766: *Pitfirrane Writs* (Scottish Records Society) 258.

[34] *RMS*, iv. 2924, 2960.

[35] Warrender Papers, SHS, i. 136–140; Moysie, *History* (Bannatyne Club), 17–19.

[36] *CSPSc*, v. 337.

[37] *Ibid.* v. 339.

[38] *RPC*, iii. 174, 178.

[39] *CSPSc*, v. 339.

[40] *APS*, iii. 137, 166.

[41] *RMS*, iv. 2924, 2930; *RPC*, iii. 519–520.

[42] *RMS*, iv. 2960: the escheats of brothers Robert, George and Gilbert were granted out in 1579 and 1580: MS RSS, xlviii. 24, 28, 55.

[43] *CSPSc*, v. 387.

Balfour spent most of his exile in France.[48] He was universally referred to as a Catholic or Spanish agent.[49] There is a report or suggestion that he also went to Madrid or at least received money from Philip II to aid James VI against Morton.[50] In 1580 he met Cobham, the English representative in Paris, and offered his service to Elizabeth. He also complained of the intolerance of the French Catholics there and said that he was going to Dieppe to hear freer preaching and to take communion.[51] His real reason in going to Dieppe was to return home for another nefarious purpose. He left Dieppe giving out he was going to Flanders.[52] He did go to Antwerp [53] but then went on to Scotland, with a "messe" of French Crowns.[54]

Return

Meanwhile in Scotland, in August 1579—only six months after Balfour had gone abroad—anonymous "placards" had invited the young King to prosecute Morton for his part in Darnley's death; and they also suggested that Balfour was the man to supply the necessary evidence—that he would have produced the Darnley murder band "as he will do yet, God willing when time and place serve."[55] No doubt Balfour would be very pleased to bring down the man who had been responsible for his misfortune. This may have been discussed with Esmé Stewart when he met Balfour in France.[56] Stewart's plan was rumoured to involve the capture of the King, the return of Balfour and the execution of Morton. Before long the young King James, or Stewart, sought Balfour's services against Morton.[57] The nature and even the existence of Balfour's vital "evidence" is of some doubt: it may have been a copy of the Darnley murder band which Morton had not signed, or the Ainslie band, which Morton had signed. When it was obvious that Balfour was not going to hand over any evidence without repatriation and a pardon, secret means were discussed by Stewart to bring him back from Dieppe along with "other (unspecified) murderers."[58] By November 1580 Balfour was on his way home. (It was prophesied that his unquiet disposition would trouble the Scottish Court.[59]) The King himself may have been ignorant of these plans.[60] Balfour reached the Mayse[61] on December 27[62] and was conveyed secretly to Edinburgh,[63] because he was still under sentence of forfeiture for treason. Next day Morton was accused of, *inter alia*, complicity in Darnley's death[64] on Balfour's information.[65] From Edinburgh, Balfour wrote to Mary asking her to give information which would convict Morton.[66] One correspondent said Balfour was all ready with the evidence against Morton [67]; but in the event it seems that he was unable to produce any band.[68] He remained in hiding.[69] When it appeared that Morton might escape for the lack of evidence there was talk of his assassination or of bringing out Balfour to confront Morton.[70] Randolph, who had instructions to expose Balfour as a Papist,[71] told the young King in which house Balfour was hiding and that he would produce the murder band.[72] Certainly Elizabeth marvelled at his presence in Scotland and wanted him arrested.[73] These requests were met by an anonymous pasquil against Randolph,[74] possibly the work of Balfour. However, six months later the " Maiden " claimed Morton after he had been found guilty art and part of concealing the King's father's murder.[75] It appears therefore that Balfour produced no evidence of Morton's actual participation in the murder.

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[44] Calderwood, viii. 31.

[45] Labanoff, v. 137, 158, 177; Laing, ii. 315, 317. According to Nau, Bothwell had given the band to Mary just before her capture in June 1567: *Memorials*, 48.

[46] *CSPSc*, v. 609; Calderwood, viii. 31.

[47] *Ibid.* viii. 31.

[48] He would be familiar with the language since his days in the galleys, thirty years earlier.

[49] *CSPSc*, v. 533.

[50] *CSPSp*, iii. 79, 101.

[51] *CSPFor*, xiv. 294.

[52] *Ibid.* xiv. 476.

[53] *Ibid.* xv. 55.

[54] *Ibid.* xiv. 476, xv. 80; *CSPSc*, v. 570.

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[55] Calderwood, iii. 771.
[56] *Cf. CSPSc*, v. 520.
[57] *Ibid.* v. 387, 390, 394, 610, 618, 621.
[58] *Ibid.* v. 474, 570, 571, 659; Moysie, 29.
[59] *CSPFor*, xiv. 521.
[60] *CSPSc*, v. 570, 609, 610, 618, 660; Calderwood, iv. 395; Moysie, 30.
[61] *CSPSc*, v. 586. (Isle of May(?) which was part of the lands of the Priory of Pittenweem.)
[62] Laing, ii. 314; *cf. CSPFor*, xiv. 515, 521.
[63] *CSPSc*, v. 570, 577, 586; Moysie, 29.
[64] *Ibid.* 17.
[65] Laing, ii. 315; *CSPSc*, v. 571.
[66] Laing, ii. 314.

Last years

Almost immediately after the execution of Morton Balfour asked leave to state his case for rehabilitation before the council.[76] A remission or respite was granted for three years on condition of his standing trial for Darnley's death.[77] One report says he was thereafter acquitted on assize [78]; another says that, although he lived yet in some darkness, his advice and counsel prevailed.[79] He also continued the work of codifying the laws which had been begun under Morton.[80] However, the former forfeitures remained and Lennox failed to get the repeal of the Act precluding restoration of the Darnley murderers.[81] Nevertheless Balfour got a limited status; in answer to the criticisms of the ministers (and to the representations of Elizabeth), the King made a declaration of protection in his favour. This was done at the suit of Stewart, presumably in gratitude for his work in bringing down Morton[82]: but James was compelled to declare twice that the protection did not wipe out the previous forfeiture and that it did not decide the question of Balfour's guilt.[83] At this time he and other royalists are referred to as Papists[84]; and one of the articles against Lennox was the calling in of such ill-affected persons as Balfour.[85] At the General Assembly of June 1582 he appeared as an elder but failed to overawe the more high-flying ministers.[86] Not unnaturally he supported the King in his pursuit of the Ruthven raiders.[87] At the end of 1582 the reports are that Balfour was restored and highly rewarded by the intercession of the Queen.[88] He was also back at domestic diplomacy trying to draw Huntly into a band in favour of the Duke.[89] Although the Prior of Pittenweem who appeared in the Parliament of October 1582 was probably not Balfour, he had insinuated himself in the priory lands.[90] He certainly regained possession of his own lands, for in 1582 and 1583 at Burleigh he directed the transcription of ancient chronicles.[91]

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[67] *CSPSc*, v. 586.

[68] *Ibid.* v. 587, 607.

[69] *Ibid.* v. 386–387, 662.

[70] *Ibid.* v. 386–387.

[71] *Ibid.* v. 575.

[72] *Ibid.* v. 662.

[73] *Hamilton Papers*, ii. 634.

[74] *CSPSc*, v. 694; *Hamilton Papers*, ii. 634; Moysie, 29.

[75] Calderwood, iii. 558; Moysie, 33.

[76] *RPC*, iii. 403.

[77] *CSPSc*, vi. 93.

[78] *Border Papers*, i. 73.

[79] *Ibid.* i. 76.

[80] Calderwood, iii. 576.

[81] *Border Papers*, i. 78.

Balfour's tortuous career came to an end with his death in 1583.[92] He was survived by his wife, Dame Margaret Balfour, heiress of Burleigh, and by six sons and three daughters. The family benefited by further restoration of the deceased's properties.[93] The eldest son, Michael, was created Lord Balfour of Burghleigh by James VI in 1607; and his line continued uninterrupted until the forfeiture of the fifth Lord after the 'Fifteen Rebellion.

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[82] Tytler, *History*, iv. 39; *CSPSc*, vi. 93.

[83] *RPC*, iii. 462, 514.

[84] *CSPSc*, vi. 129.

[85] *Ibid.* vi. 152.

[86] Calderwood, iii. 663, 664; BM Ayscough, 4736, ff. 1195–1199 quoted in Tytler, iv. 45.

[87] *CSPSc*, vi. 157

[88] Which queen intended is not stated: it is difficult to imagine either Mary or Elizabeth being willing or able to further his interests: *ibid.* vi. 93, 172, 186; *RPC*, iii. 625.

[89] *CSPSc*, vi. 179.

[90] *RPC*, iii. 519–520.

[91] Bisset, *Rolement of Courtis* (Scottish Text Society), ii. 275.

[92] *RMS*, v. 593, 614. Balfour is noted as being dead on October 26, 1583 (*RMS*, v. 614). This appears from the *confirmation* of a charter which narrated that the Priory of Pittenweem was vacant (at that date) by reason of the death of Balfour or (*sive*) the resignation of Haliburton—both of whom had the Priory. The actual *charter* was dated July 31, 1583 (*RMS*, v. 593) and proceeds on the vacancy created by the resignation of Haliburton only. Accordingly we can assume that Balfour was alive then. That he was alive in some part of 1583 may also be borne out by reference to his directing Habbakuk Bisset and another to write out old chronicles at Burlie (*Rolement of Courtis* ii. 275). Therefore Balfour died between July 31 and October 26, 1583.

Balfour's treachery and corruption were great and excited comment in an age when few public men in Western Europe were pillars of integrity. The royal ministers of sixteenth-century Scotland were probably only a little more tarred than their counterparts in Spain or France or England. Even the Elizabethan ministers had their Spanish pensions, although that was probably regarded as spoiling the Egyptians. If public morality was in fact lower in Scotland than elsewhere it was not due to any inherent wickedness of Scotsmen but rather to the weakness and chronic poverty of the Crown, which precluded proper control and adequate remuneration of royal servants. Whatever the standard, however, Balfour was pre-eminent in treachery.

On the other hand there is no doubt but that he was a very able man. His legal talents—as far as they are apparent from the *Black Acts* and his *Practicks*—are undisputed. As a negotiator he was most successful, for in the civil war he achieved the reconciliation of the most divergent factions. As far as is known he discharged his political and judicial offices adequately. And to stay alive, so hated as he was, was no mean feat. That his services—even as a sixteenth-century " hatchet-man "—were sought by successive régimes is also some testimony of his ability. But he was a rogue—albeit a clever and a witty one. It seems to have been characteristic of many Scots lawyers and public men—such as Archibald Douglas, Haddington, Bothwell, Morton, Lauderdale, " Bloodie Mackenzie," Master of Stair, Dundas, Braxfield—that they should be very clever men, and often highly cultivated men, but with some imperfection of character, cruelty, venality, treachery, greediness or just plain crookedness. Balfour was no exception.

PETER G. B. MCNEILL.

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[93] *RPC*, iii. 625; *APS*, iii. 319, 413 493.

PROBLEMS OF NATURAL JUSTICE

WHEN Mr. H. W. R. Wade published his valuable study of natural justice in relation to modern administrative processes he entitled it "The Twilight of Natural Justice."[1] His title neatly epitomises his main thesis that undue inroads are being made on the principle of natural justice in modern administrative processes; but it may not be entirely fanciful to discern a wider significance in it. It is, after all, in crepuscular surroundings that the *ignis fatuus* most frequently makes its appearance; and natural justice appears as a kind of legal *ignis fatuus* before the eyes of the student who attempts its analysis.

Confronted with a phrase like "natural justice" any lawyer must feel slightly at a loss. The expression might be designed to warn him off a territory more suited to the inhabitance of the philosopher; and, with the greatest respect and admiration, it is still possible to flinch at the prospect that the learning of the philosopher may be employed as a means of reaching a decision in law. Natural justice to the lawyer, then, if it is not to be a mere incantation, must be reducible to terms less rarified than those of ethics.

Yet the expression does suggest that ethical considerations are embraced in it. It may even be that it owes its very origin to philosophic thought. "Civil justice," said Aristotle,[2] "is partly natural justice and partly conventional (legal): natural justice possesses the same validity everywhere and does not depend upon being laid down as law: conventional (legal) justice is that in which at the outset it is immaterial what form it takes and where it matters only that it is laid down." This pronouncement takes us well beyond the confines of legal argument. Natural justice, according to Aristotle, has absolute attributes: justice under the legal system is not concerned with these attributes but consists only in rendering to each man what is due to him under the legal system (*jus suum cuique*). For this purpose all that matters is what has been ordained as law under the legal system in question.

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[1] (1951) 67 L.Q.R. 103.

[2] Nic. Eth. V, 7: Τοῦ δὲ πολιτικοῦ δικαίοῦ τὸ μὲν φυσικὸν ἐστι, τὸ δὲ νομικόν, φυσικὸν μὲν τὸ πανταχοῦ τὴν αὐτὴν ἐχὸν δυναμιν, κὰι ο'υ τὼ δοκεῖν ἢ μὴ, νομικὸν δὲ ὅ ἐξ ἀρχῆς μὲν οὐδὲν διαφερει οὕτως ἢ ἄλλως, ὅταν δὲ θῶνται διαφερει.

There is, therefore, force in Professor Keeton's observation that natural justice is " potentially a revolutionary concept,"[3] since if the notion were allowed free scope in any legal system it would eschew the application of pre-existing legal rules in favour of posing the question whether in any given case these pre-existing rules are operating fairly. It is this difficulty which may have led Aristotle to distinguish between natural justice and legal justice. It is the same difficulty which impels Professor Keeton to seek for a " generally accepted criterion " of natural justice as viewed by the law, because, as he observes, if no such criterion exist, " what alternative have we to the position that fair play is what the judge trying the case says it is? "[4]

No great help is to be obtained from reported Scottish decisions in the search for a criterion such as Professor Keeton desires. The expression " natural justice " has been sparingly used in Scottish cases: but a number of decisions as to the proceedings of licensing courts, where it was alleged that there was bias on the part of the members of the court, or some of them,[5] or that the applicant did not receive a fair hearing,[6] have established the principle that, while procedurally such bodies may conduct themselves in a manner differing from that of a court of law, nevertheless they must act " in a judicial way and not contrary to all the rules of judicial fairness."[7] The doctrine of natural justice was recognised as forming part of Scots law by Lord

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[3] Keeton, " Natural Justice in English Law," *Current Legal Problems*, 1951, p. 24.

[4] *Ibid.* p. 24.

[5] *McGeehen* v. *Knox*, 1913 S.C. 688; 1913, 1 S.L.T. 283. *Goodall* v. *Bilsland*, 1909 S.C. 1152; 1909, 1 S.L.T. 376.

[6] *Goodall* v. *Bilsland* (*supra*).

[7] *Ibid. per* Lord Dunedin at p. 1179.

Cooper in *Edinburgh University* v. *Craik*.[8] These cases, and the decisions of *Burgh of Ayr* v. *Secretary of State for Scotland*[9] and *Barrs* v. *British Wool Marketing Board*,[10] are sufficient to convince the doubting that appeals to natural justice do not cease at the Scottish Border. It would, however, be too much to claim that they add appreciably to our understanding of what natural justice is.

Even when the assistance of the English authorities is called upon, it must be accepted that in speaking of natural justice the courts have not employed the term in the Aristotelian sense[11]; but it by no means follows that the courts have been entirely uninfluenced by some sort of ethical standards, and it may be that it is the conflict between a reaching out for some workable ethical criterion and professional distrust of ethical concepts, which has led to the variety which has attended judicial utterance on the subject. It has been a matter of judicial observation, if not always regret, that the principles of natural justice are vague and difficult to ascertain.[12] But this has not deterred judges from endeavouring to elucidate them by appealing to "substantial justice,"[13] or by equating them to those of British justice,[14] or by explaining them as "a sense of fairness"[15] or "judicial fairness."[16] If these glosses on the expression are collated and compared one may receive the impression that it is not indeed used in the Aristotelian, but rather in the Pickwickian, sense. At the same time one cannot fail to reflect that even when judges are most emphatic in their rejection of general " ethical " considerations, they frequently explain the principles in terms at least as difficult to apply precisely. Thus Lord Shaw in his judgment in *Local Government Board* v. *Arlidge*, after his denial (already quoted [17]) of any ethical content in the legal use of the expression natural justice, proceeds to explain the scope of the principle as requiring the body " to do its best to act justly and to reach just ends by just means." [18] He later points out that, where statutory guidance is provided, that guidance must be followed; but where there is no such guidance he reiterates his version of the principle of natural justice, giving it, perhaps, added force by describing it as a duty " to act honestly and by honest means." [19] Lord Shaw's reference to reaching " just ends by just means " and acting " by honest means " can be explained in terms of his avowedly pragmatic and legalistic approach as strictly confined to procedural requirements; but his exhortations to act " justly " and " honestly " seem of themselves to import those ethical considerations which elsewhere in his judgment he excludes from consideration.

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[8] 1954 S.C. 190 at p. 195; 1954 S.L.T. 45 at p. 48: "It is a universal principle of natural justice that a man must not be judge in his own cause, and that judicial functions should never be exercised by a person having an interest in the result."

[9] 1950 S.C. 102; 1950 S.L.T. 257.

[10] 1957 S.C. 72; 1957 S.L.T. 153.

[11] *R.* v. *Local Government Board, ex p. Arlidge* [1915] A.C. 120, *per* Lord Shaw at p. 138: "In so far as the term 'natural justice' means that a result or process should be just, it is a harmless, though it may be a high-sounding, expression; in so far as it attempts to reflect the old *jus naturale* it is a confused and unwarranted transfer into the ethical sphere of a term employed for other distinctions."

[12] *Holt* v. *Markham* [1923] 1 K.B. 504, where Scrutton L.J. (at p. 513) characterises it as "a well-meaning sloppiness of thought." Natural justice in that case, however, was concerned with general equitable considerations.

[13] *R.* v. *Local Government Board, ex p. Arlidge* (*supra*), *per* Lord Parmoor at p. 140.

[14] *Errington* v. *Minister of Health* [1935] 1 K.B. 249, *per* Roche L.J. at p. 280.

[15] *Franklin* v. *Minister of Town and Country Planning* (1947) 63 T.L.R. 143, *per* Henn Collins J. at p. 144.

[16] *Goodall* v. *Bilsland* (*supra*, note 7).

The insidious intrusion of ethical concepts, however modified and restricted in scope, in Lord Shaw's judgment is sufficiently striking to merit reflection. It seems that there are really two difficulties in the way of clear legal thinking on such an expression as natural justice, and that these difficulties arise from the two words used in the expression. First, if we appeal to " justice " we are appealing to an ethical idea and a peculiarly elusive one; and even if we try to confine it within rigid legal limits, it is difficult to escape the tendency to expand or explain the most rigid rules as to its content in wider terms such as " substantial justice,"

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[17] *Supra*, note 11.

[18] *R.* v. *Local Government Board, ex p. Arlidge* (*supra*), at p. 138.

[19] *Ibid.*

"British justice," "fairness," or "acting justly." Secondly, as Sir Carleton Allen, with the happy combination of wisdom and wit which one has learned to expect from him, has pointed out,[20] justice is a far from natural thing; and a sense of justice comes, not as a natural inspiration, but "by reflective understanding of human affairs in different settings and in all their endless complexities." It is true that orators have been known to ascribe to the British people an instinctive sense, if not of abstract justice, at least of its poor relation, fair play. This has become so much of a platitude that it would border on the heterodox to deny it, since it is obviously a generalisation difficult to disprove. It is, perhaps, equally difficult to prove, and if, as seems not improbable, French orators, or Italian orators, are on occasion moved to endow their audience with similar attributes, the only safe conclusion for the reflective is that Britons are credited with a natural sense of what constitutes fair play in Britain, just as Frenchmen and Italians may have a similar sense of fair play as understood in their respective countries. To inflate the British sense of fair play to the wider and more universal concept of natural justice, however acceptable to British ideas, is not likely to be uncritically received elsewhere.

It seems clear, therefore, that, while it is fruitless to import ethical absolutes into the legal doctrine of natural justice, at the same time—and probably because the expression is a most unfortunate one—we cannot easily slough all ethical overtones when we seek to apply the requirements of natural justice in legal argument. It is instructive that the idea of fair play is the idea on which Professor Keeton lights when he reflects upon the potentially revolutionary nature of the doctrine.[21] It is true that such ethical or quasi-ethical overtones have never been allowed to exceed rigidly imposed bounds, but the effect has been that satisfactory explanation of the content of the principle in general terms is rarely to be found in the judgments in reported cases.[22] Judges have tended either to describe the principle in rather loose generalities of the type already quoted or to confine themselves to illustrating its application in the case before them. It is nowadays generally accepted by commentators that natural justice in the legal sense comprises the two rules mentioned by Lord Haldane: (a) the right to a full and fair hearing, and (b) the right to a decision by an unbiased adjudicator.[23] The requirements of the principle so regarded affect the procedure before the adjudicating body, not the merits of their decision. Moreover, to require a full and fair hearing for parties is not to impose on the adjudicating body in every case the duty of conducting themselves as if they were a court of law. " I do not think they are bound to treat such a question as though it were a trial. . . . They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view."[24] Both rules have been applied to the actings of bodies whose functions are regarded as partaking of a judicial nature and have been repeatedly laid down as minimal standards for the conduct of inferior courts[25] and for judgments of foreign courts.[26] Nowadays, however, the rules are sought to be applied to a wide range of administrative and domestic bodies exercising powers of adjudication and in the application of a compendious natural justice comprising these two requirements to differing circumstances both elements of the rule have produced their own difficulties.

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[20] *Law and Orders*, 2nd ed., p. 276.

[21] *Supra*, note 3. See also *Moore* v. *Clyde Pilotage Authority*, 1943 S.C. 457 at 466; 1944 S.L.T. 111 at 115.

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[22] A notable exception being the dictum of Lord Haldane in *R.* v. *Local Government Board, ex p. Arlidge* [1915] A.C. 120, at p. 132: "When the duty of deciding an appeal is imposed, those whose duty it is to decide must act judicially. They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of presenting adequately the case made"; and see *Board of Education* v. *Rice* [1911] A.C. 179, *per* Lord Loreburn at p. 182.

[23] Sir Carleton Allen (*Law and Orders*, 2nd ed., pp. 276 *et seq.*) examines other alleged elements such as the obligation to give reasons for the decision and to disclose all relevant information in possession of the adjudicating body to the parties, but rejects those as insufficiently established by authority.

[24] *Per* Lord Loreburn, *loc. supra cit.*, note 22.

[25] See, for example, *R.* v. *Rand* (1866) L.R. 1 Q.B. 230; *R.* v. *Sunderland Justices* [1901] 2 K.B. 357; *R.* v. *Justices of Hertfordshire* (1845) 6 Ad. & E. (New Series) 753.

[26] *Robinson* v. *Fenner* [1913] 3 K.B. 835.

Perhaps the aspect of natural justice most frequently encountered in the reports is the rule requiring that parties should be given a full and fair hearing. A study of the numerous decisions in which this aspect of natural justice is considered leaves a variety of doubts unresolved or only partially resolved. It is possible to entertain the view that what natural justice requires of the proceedings of a court of summary jurisdiction [27] or of a foreign judgment [28] differs from its requirements of the proceedings of an administrative [29] or a domestic [30] tribunal or in respect of the exercise of certain types of administrative discretion.[31] Undoubtedly, there are special circumstances attaching to some of these manifestations of judicial exercise of power which may call for modification of the requirements in particular cases, but if natural justice itself, as a legal concept, is to vary with its application to different bodies, one cannot but regard it as curiously described and indeed as little more than " a sentimental rather than a rational approach to legal issues." [32] Yet there is a tendency for certain passages in the judgments dealing with decisions of each of these varying types of adjudicatory agency to express the actual content of the rule in different ways.[33] This difficulty is very clearly accentuated in a passage from the judgment of Tucker L.J. in *Russell* v. *Duke of Norfolk* [34] (a case dealing with the conduct of a domestic tribunal), where he says, " There are, in my view, no words which are of general application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used. . . ." [34a]

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[27] *R.* v. *Sussex Justices, ex p. McCarthy* [1924] 1 K.B. 256 at p. 259.

[28] *Robinson* v. *Fenner (supra).*

[29] *R.* v. *Local Government Board, ex p. Arlidge (supra).*

[30] *Russell* v. *Duke of Norfolk* [1949] 1 All E.R. 109, *per* Tucker L.J. at p. 118: " This matter is not to be judged by the standards applicable to local justices."

[31] *Burgh of Ayr* v. *Secretary of State for Scotland*, 1950 S.C. 102; 1950 S.L.T. 257.

[32] Allen, *Law and Orders*, 2nd ed., p. 276.

[33] See, *e.g.*, *per* Channell J. in *Robinson* v. *Fenner (supra)* at p. 642; *per* Buckley L.J. in *Local Government Board* v. *Arlidge* [1914] 1 K.B. 160 at p. 185; *per* Pilcher J. in *Davis* v. *Carew-Pole and Others* [1956] 1 W.L.R. 833 at p. 838.

[34] [1949] 1 All E.R. 109 at p. 118.

A consideration of the authorities appears to afford full support to these views. The only attributes of natural justice which can in the light of authority be safely regarded as universally applicable are of a negative nature. Thus it may safely be accepted that the principle of natural justice, whatever its content, is in no sense an ethical principle.[35] Again any consideration of the merits of the decision is excluded. Natural justice, whatever its scope, is confined to procedural aspects. The fact that the decision of a foreign court, for example, appears to the courts of this country to be wrong, or even extremely wrong, on the merits does not afford a sufficient foundation for the application of the principle.[36] The attitude of the courts, in confining the application of the principle to cases where the *procedure* adopted has involved a denial of justice and in refusing to reconsider a decision challenged as defective of natural justice on the merits of the case, is traceable as a constant feature of the application of the principle to the decisions of all bodies from which the law demands a "judicial" attitude of mind objectively arrived at rather than a policy decision based upon expediency,[37] whether the decision be that of a foreign court, a tribunal, or the holding of an inquiry for the guidance of a minister exercising a discretionary power.

[34a] The application of general words culled from English judgments to Scottish cases provides further difficulties owing to the divergence between the two legal systems. Thus dicta by Lord Goddard C.J. in *R.* v. *Metropolitan Police Commissioners, ex p. Parker* [1953] 1 W.L.R. 1150, at p. 1155, and in *Ex p. Fry* [1954] 1 W.L.R. 730, at p. 733, have been regarded as authority for the proposition that acts of domestic discipline within a police force or fire service are not judicial or quasi-judicial in nature. The *ratio decidendi* of these cases, however, seemed to depend upon the view that it is inappropriate to apply the discretionary order of certiorari to such acts; and since this question does not arise in Scotland, Lord Goddard's view as to the nature of such disciplinary acts has not been followed in the Scottish case of *McDonald and others* v. *Lanarkshire Fire Brigade Joint Committee*, 1959 S.L.T. 309.

[35] *R.* v. *Brighton Rent Tribunal* [1950] 2 K.B. 410. But the term has on occasion been employed to cover equitable considerations of an ethical kind; *Wiseman* v. *Wiseman* [1953] 2 W.L.R. 499; *Semtex, Ltd.* v. *Gladstone* [1954] 1 W.L.R. 945.

[36] *Per* Channell J. in *Robinson* v. *Fenner* (*supra*).

In a number of cases dealing with domestic tribunals exercising disciplinary powers, such as those associated with professional associations and trade unions, the courts have, from time to time, asserted a right of review which goes beyond purely procedural matters and enters to some extent upon the merits of the tribunal's decision.[38] These cases are distinguished from cases involving domestic tribunals which consider such matters as the expulsion of members from clubs.[39] In the club cases the duty of the courts is confined to seeing that the adjudicating body or committee has observed the procedure laid down in the rules of the club and that the member has had notice of the charge and a reasonable opportunity of being heard. Where the domestic tribunal is one which adjudicates on members of a trade or profession, the courts have in some cases extended their powers of review to cover matters affecting the merits of the decision. They will consider whether, on a correct interpretation of the rules under which the tribunal acts, it has exceeded its jurisdiction by dealing with conduct which, in the opinion of the court, does not come within the scope of those rules.[40] They will also consider whether there was any evidence before the tribunal upon which it could reasonably have come to its decision.[41] While these additional powers of review are closely allied to considerations of "natural justice" in the wide and rather vague sense in which it is sometimes invoked even in the courts,[42] it appears that they are not ascribed to "natural justice," which, even in such cases, remains concerned with the procedural aspects only. The right to review the decision upon the merits, to the limited extent above noticed, is ascribed, not to the application of the rules of natural justice, but seemingly to considerations of public policy, on the ground that domestic tribunals of the type mentioned may, by their decisions, affect the livelihood or reputation of the member of the trade or profession concerned.[43]

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[37] "In other words, they must act judicially, not judiciously"—*per* Parker L.J. in *R.* v. *Manchester Legal Aid Committee, ex p. Brand & Co., Ltd.* [1952] 2 Q.B. 413, at p. 431.

[38] *Leeson* v. *General Council of Medical Education and Registration* (1890) 43 Ch.D. 366; *Allinson* v. *Same* [1894] 1 Q.B. 750; *Osgood* v. *Nelson* (1872) L.R. 5 H.L. 636, at pp. 646–654.

[39] *e.g.*, *Labouchère* v. *Earl of Wharncliffe* (1879) 13 Ch.D. 346; *Dawkins* v. *Antrobus* (1881) 17 Ch.D. 615.

[40] *Lee* v. *Showmen's Guild of Great Britain* [1952] 1 T.L.R. 1115, *per* Denning L.J. at pp. 1123–1124.

[41] *Allinson* v. *General Council of Medical Education and Registration* (*supra*); *Osgood* v. *Nelson* (*supra*).

When the requirement of a full and fair hearing is examined, its implications become more difficult to work out. In relation to foreign judgments a challenge may be based on the absence of notice of the proceedings and inadequate opportunity to plead.[44] In relation to domestic tribunals it has been held to mean that a party appearing before the tribunal should be given a full and fair opportunity of being heard,[45] and that if he is arraigned before the tribunal he should be given notice of the charge or complaint which he has to meet[46]; though, apparently, the fact that he is given no prior notice of the charges, or some of them, will not be fatal, if the reviewing court holds that he was not prejudiced by lack of prior notice.[47] In this particular, it is doubtful whether the English decisions would be followed in the Scottish courts, which have adopted a more rigid attitude towards any departure from natural justice.[48] In relation to administrative tribunals, probably the most elaborate exposition of this element of the rules of natural justice is contained in the dictum of Buckley L.J. in *R.* v. *Local Government Board, ex p. Arlidge*[49]: "For instance, the Board could not make a rule—first, that neither the appellant nor the local authority should be heard orally or in writing or in any manner of way whatsoever; nor, secondly, that each should be heard but only in the absence of the other; nor, thirdly, that neither should be informed of the facts alleged or arguments advanced by the other. These would each and all be contrary to natural justice. I think and will assume that, fourthly, a rule could be made that each should be heard originally, not orally, but in writing; but, fifthly, I greatly doubt whether a rule would be valid that a party who, having submitted his case in writing, desired to be heard orally, should not be heard."

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[42] In the pleadings in *Semtex, Ltd.* v. *Gladstone* [1954] 1 W.L.R. 945, an appeal to equitable considerations was couched in the form that the conduct complained of was "contrary to natural justice": see also *Wiseman* v. *Wiseman* [1953] 2 W.L.R. 499.

[43] *Lee* v. *Showmen's Guild of Great Britain* (*supra*), *per* Somervell L.J. at pp. 1121–1122; Denning L.J. at p. 1123.

[44] Dicey, *Conflict of Laws*, 7th ed., p. 1010.

[45] *General Medical Council* v. *Spackman* [1943] A.C. 627, *per* Lord Wright at p. 644.

[46] *Byrne* v. *Kinematograph Renters' Society, Ltd.* [1958] 1 W.L.R. 762, *per* Harman J. at p. 784.

[47] *Davis* v. *Carew-Pole* [1956] 1 W.L.R. 833, *per* Pilcher J. at p. 840. (This view seems at variance with the words of Lord Wright in *General Medical Council* v. *Spackman* (*supra*) at p. 644: "If the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of a departure from the essential principles of natural justice.")

It seems that, in applying the requirement of a full and fair hearing to the proceedings of administrative and domestic tribunals, the tendency to avoid a general exposition and to exemplify rather than define may arise from two causes: (a) the recognition that, if general words defining the content of natural justice are sought, they cannot improve on the words already used by Lord Haldane[50] which themselves stress the need for considering the principle in relation to the case before the court; and (b) the need to examine the statute or the rules under which the tribunal is operating to ascertain how far, if at all, the principle of natural justice is allowed to operate.

The second of these considerations is a particularly difficult one for logical appreciation. If a tribunal is set up to adjudicate upon issues and if, as Lord Haldane asserts, certain broad requirements are made by law of procedure before any adjudicating body in the sonorous name of natural justice, it is difficult to make the necessary mental adjustment to accept that, nevertheless, natural justice even in this restricted sense cannot be applied as an invariable standard but may alter according to circumstances.[51] Yet there is no doubt that, so far as administrative tribunals are concerned, the right to natural justice exists only in so far as it is allowed in terms of the statute under which the tribunal is working. This is recognised by Lord Cooper in *Edinburgh University* v. *Craik*[52]; and in *Arlidge's* case and other decisions[53] the English courts have also held that observance of the rules of natural justice by a statutory tribunal is incumbent upon the tribunal only so far as the statute admits of the principle being applied, though clear indication (not necessarily amounting to Lord Cooper's requirement of specific authorisation) of an intention to deprive parties of the protection of the principle will be required. So far as domestic tribunals are concerned, the right to natural justice seems to depend on the rules under which the tribunal is operating.[54]

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[48] *Barrs* v. *British Wool Marketing Board*, 1957 S.C. 72; 1957 S.L.T. 153, where the presence of one side at the deliberations of the adjudicating body was held to be fatal to the validity of the decision though they had taken no part in the deliberations. *Cf. Ryder* v. *Minister of Housing and Local Government* [1954] J.P.L. 508.

[49] [1914] 1 K.B. 160 at p. 185.

[50] *R.* v. *Local Government Board, ex p. Arlidge* (*supra*, note 22).

The right to invoke the rules of natural justice in challenging a decision of a domestic tribunal carries with it its own perplexities. No Scottish authority seems to exist on this point, but several English decisions deal expressly with it and their effect is again to restrict the application of the principle. They indicate that, to appeal to natural justice as invalidating a decision of a domestic tribunal, the person aggrieved must first establish his right in law to require from them a decision in accordance with natural justice. Apart from cases when a proprietary right of his has been infringed, or a tort or delict has been committed by the adjudicating tribunal (in which case malice on their part would require to be averred and proved) or where the tribunal have been guilty of a conspiracy to injure him, the right to natural justice has been held to depend upon the existence of a contractual relationship, express or implied, between the aggrieved person and the tribunal.[55] The *ratio decidendi* of this case does not, however, necessarily support the view that a tribunal need not act according to natural justice if there is no contractual relationship between the plaintiff and themselves. It merely deprives the plaintiff of the right to claim damages against the tribunal if there is no contractual relationship, leaving the court empowered to grant a declaratory remedy if satisfied that the dictates of natural justice have not been observed.[56] Even when this qualification is noted, the rule of *Abbot* v. *Sullivan* still provides its problems. In *Davis* v. *Carew-Pole* Pilcher J. overcame the difficulty by finding that the plaintiff had submitted to the jurisdiction of the tribunal and, on that ground, held that he had entered an implied contract to abide by the tribunal's decision, *subject to any legal right which he had to impugn it.* But in *Abbot* v. *Sullivan*, where the plaintiff had refused to attend the tribunal, asserting that they had no jurisdiction, it was not possible to bring him into a contractual relationship with the tribunal of the kind expounded by Pilcher J. and he was held to have no contractual basis for invoking the principle of natural justice. In the circumstances disclosed in *Abbot* v. *Sullivan*, while the plaintiff might have appealed in name of natural justice to the rule against bias, there is little room for applying the rule *et audiatur altera pars.* If the plaintiff has intentionally absented himself from the proceedings he can hardly complain of being denied a hearing of which he refused to avail himself. He has chosen to rely upon an attack upon the decision as without jurisdiction and *ultra vires* of the adjudicating body.

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[51] Professor Robson advances this criticism in *Justice and Administrative Law*, 3rd ed., p. 331.

[52] 1954 S.C. 190 at p. 195; 1954 S.L.T. 45 at p. 48: "There are cases under other statutes and orders in which infringement of the principle I have mentioned has been specifically authorised." In his opinion Lord Cooper is dealing solely with the rule against bias but his remarks appear to apply equally to the requirement of a hearing.

[53] For instance, *R.* v. *London C.C., re The Empire Theatre* (1895) 71 L.T. 638, *per* Wright J. at p. 640. In *Hanily* v. *Minister of Local Government and Planning* [1952] 1 T.L.R. 1304, it was held that under the statute an owner need not be heard on an application by another party for planning permission to develop the owner's land, though Parker J. considered that the proceedings might well be judicial in nature. The owner is now protected by the Town and Country Planning (Scotland) Act, 1959, s. 36, and though he has no right to a hearing he is entitled to make representations against the application.

[54] *Russell* v. *Duke of Norfolk* (1948) 64 T.L.R. 263; (1949) 65 T.L.R. 225.

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[55] *Abbot* v. *Sullivan* [1952] 1 K.B. 189.

[56] *Davis* v. *Carew-Pole* [1956] 1 W.L.R. 833. In *Abbot* v. *Sullivan* (*supra*), the right to a declaratory judgment was of academic interest only; but, as Pilcher J. points out in *Davis* v. *Carew-Pole*, the rule enunciated in *Abbot* v. *Sullivan* does not preclude the plaintiff from obtaining a declaratory order.

The conception of a contractual right to natural justice has given rise to further difficulty in the case of *Russell* v. *Duke of Norfolk and Others.*[57] In that case a body entrusted with a domestic regulatory duty, and claiming under their rules an unfettered discretion to discharge that duty without holding any inquiry, chose nevertheless to hold an inquiry the proceedings of which were later challenged as defective in natural justice. It was said that defect of natural justice in those proceedings was not a matter of which complaint could be made by the party affected, since no contractual basis existed for the obligation to treat him with natural justice. "If there was no contractual duty to hold an inquiry," asks Lord Goddard L.C.J., "how can there be a breach of contract in withdrawing the licence however the inquiry was conducted?" This question doubtless expects the answer that there can be no breach of contract—an answer which it is difficult to withhold from a question so framed. But even if the expected answer is given it seems doubtful whether it disposes of the difficulty.[58] If an inquiry has in fact been held, something more has happened than a meaningless and unnecessary ceremony on the part of the investigating body. Instead of disposing of the matter, as they are entitled to do by their rules, in a decision which is inscrutable, the investigating body have chosen to arrive at their decision more openly by holding an inquiry. By doing so, they are exposing to some extent, and at least to the eyes of the parties appearing before them, the mental processes by which they have arrived at their decision ; and if in the inquiry which precedes that decision they have ignored the dictates of natural justice, then they have set aside those very dictates which the law has prescribed as essential in the process of coming to an honest and fair decision.[59] The short question posed by Lord Goddard may, therefore, not exhaust the issue: for, although, in terms of contract, the aggrieved party may not be entitled to insist upon any inquiry being held, he is entitled to a decision which is honest and in good faith, as Denning L.J. (as he then was) expressly states.[60] If no inquiry be held, he will, no doubt, find difficulty—perhaps insurmountable difficulty—in establishing that the decision complained of offends in either of these particulars. But if the investigating body have chosen, whatever the position under the rules, to inform themselves by holding an inquiry and if the proceedings at that inquiry fail in point of natural justice, then the investigating body are publicly exposing the fact that their decision has been reached by means of a process which is defective of those very attributes which have been regarded as essential for a decision which is honest and in good faith.[61] The reasoning of the Court of Appeal in *Abbot* v. *Sullivan* (as explained by Pilcher J. in *Davis* v. *Carew-Pole*) seems to support the view that the *application* of the rules of natural justice need not depend upon the plaintiff being able to establish a contractual right to require the adjudicating body to act in accordance with that principle.[62] Even if no contractual right exists, the court may grant a declaratory order that the proceedings were not in accordance with the principle of natural justice, though the plaintiff's right to damages against the adjudicating body may, in some cases, be precluded by the absence of a contractual relationship between him and the domestic tribunal.

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[57] (1948) 64 T.L.R. 263; (1949) 65 T.L.R. 225. The dictum of Goddard L.C.J. (1948) 64 T.L.R. at p. 265, disposing of the right to natural justice as without contractual foundation was supported by Tucker L.J. (1949) 65 T.L.R. at p. 228, but if wrong in that view, Tucker L.J. considered that there was no evidence that the principles of natural justice had been violated in the proceedings (at p. 231). Asquith L.J. (at p. 231) and Denning L.J. (at p. 231) both considered that an inquiry must be held in cases where withdrawal of a licence for misconduct was involved and that the inquiry must conform with natural justice. Both however agreed that there was no evidence of violation of the principle.

[58] It has, however, been so regarded in the Irish case of *Green* v. *Blake* [1948] I.R. 242.

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[59] "They must act in good faith and listen fairly to both sides, for that is a duty lying upon everyone who decides anything," *per* Lord Loreburn in *Board of Education* v. *Rice* [1911] A.C. 179 at p. 182.

[60] *Russell* v. *Duke of Norfolk* (1949) 65 T.L.R. 225 at p. 231.

[61] See the dictum of Lord Loreburn, *supra*, note 22.

[62] Indeed there are dicta in *Lee* v. *Showmen's Guild of Great Britain* (*supra*), which appear to establish that, in cases where a man's livelihood or reputation is concerned, considerations of public policy will not permit of a contractual stipulation limiting the application of the rules of natural justice or preventing recourse to the courts being accepted as valid: see Denning L.J. [1952] 1 T.L.R. at p. 1122; Romer L.J. at pp. 1130 to 1131.

The remaining aspect of natural justice—the requirement of an unbiased decision—cannot be allowed to pass unnoticed since this also has been productive of its own perplexities. In the traditional view of the nineteenth century the idea was simply expressed in the dictum that a man cannot be the judge in his own cause; and the slightest pecuniary interest on the part of a judge in the result of a cause has been held sufficient to disqualify him even though that interest cannot be shown to have affected his decision in any way.[63] But bias can arise from other causes than pecuniary interest, such as relationship with, or hostility to, one of the parties to the dispute or interest in, or sympathy with, the objects to be furthered by deciding in favour of one party rather than another. In such cases the rule against bias is much more restricted. Personal relationship or alleged antipathy is not *per se* evidence of such bias as will invalidate a decision, as is the case with pecuniary interest. There must be a " real likelihood of bias " [64]; and Lord Hewart's famous dictum, " justice should not only be done but should manifestly be seen to be done "—a dictum framed in such universal terms as to have become for some [65] in itself a requirement of natural justice—has been approved by the House of Lords as a test of whether real bias exists.[66]

One aspect of bias which has given rise to considerable anxieties is the question of interest on the part of the adjudicating party in administrative policy the furtherance of which may be in issue in the dispute before him. Even before statutory powers to a minister or department to decide questions in which their own policy was involved were as common as they are today, this type of bias was rarely the ground of an effective challenge. Thus the presence in the judge of a general interest in the policy or objects of one party to the dispute, as where a justice in a case involving cruelty to an animal was a subscriber to the National Society for Prevention of Cruelty to Animals,[67] does not afford a ground for challenge of the proceedings. Similarly the fact that a member of a licensing court is a subscriber to a temperance organisation[68] or even a member[69] of such an association has been held not to establish bias such as will invalidate the proceedings. Active support previously lent by a member of a licensing court to a campaign to oppose the grant of licences has been instanced as sufficient evidence of bias to afford a challenge of the proceedings at the licensing court, on the ground that it was contrary to judicial fairness that a person who had been actively employed in " getting up the cases " to be heard before the court should then sit in adjudication upon them.[70] More generally, evidence of conduct showing that the judge has such preconceived and unalterable views that there is no possibility of a fair hearing before him will be a ground of challenge.[71]

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[63] *Dimes* v. *Grand Junction Canal* (1852) 3 H.L.C. 759.

[64] *Frome United Dairies* v. *Bath Justices* [1926] A.C. 586; *R.* v. *Camborne Justices, ex p. Pearce* [1954] 3 W.L.R. 415.

[65] But not, certainly, for Sir Carleton Allen; *Law and Orders*, 2nd ed., p. 278.

[66] *Franklin* v. *Minister of Town and Country Planning* [1948] A.C. 87; *per* Lord Thankerton at p. 103.

The rule against bias, while embraced within the principle of natural justice, is therefore contained within fairly rigid limits, and in administrative adjudications it may be further invaded by statute because it is recognised that, if the statute sanctions a " biased " decision, the rule against bias cannot be invoked. In an interesting comparative study of English and Italian law [72] Dr. Galeotti advances the view that the entrusting of adjudication of disputes to ministers and others having an interest in policy is itself a powerful factor in the denial of natural justice *in its entirety* to such proceedings. Basing his argument upon the *Stevenage* case,[73] he contends that there the attempt was made to apply the rule against bias in circumstances which could not support it since the New Towns Act, 1946,[74] by leaving the final decision to the discretion of the Minister, had clearly intended to prefer a decision by a Minister " biased " in favour of his own policy to the unbiased decision of the court. To admit the challenge of bias the proceedings would require to be judicial or quasi-judicial in character so as to permit of the application to them of the principle of natural justice of which the rule against bias is a component part. But the rule against bias could not in view of the terms of the statute be held applicable and since one element of natural justice was inapplicable the court, according to Dr. Galeotti, reasoned that the principle itself must be inapplicable and that the character of the proceedings was therefore not " quasi-judicial " but administrative in character. This reasoning, he complains, fails to recognise that the rule *et audiatur altera pars* may still be applicable even though the possibility of challenge on grounds of bias is precluded.

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[67] *R.* v. *Deal Justices, ex p. Carling* (1881) 45 L.T. 439.

[68] *Goodall* v. *Bilsland*, 1909 S.C. 1152; 1909, 1 S.L.T. 376.

[69] *McGeehen* v. *Knox*, 1913 S.C. 688; 1913, 1 S.L.T. 283. In this case the court proceeded on the view that, since the statute imposed no disqualification, it was a matter for the conscience of the member concerned whether he could act in an unbiased way in the proceedings of an administrative body like a licensing court. The *ratio* of this decision would therefore not necessarily apply to a purely judicial body such as a magistrates' or justices' police court.

[70] *Goodall* v. *Bilsland* (*supra*), *per* Lord Dunedin at pp. 1177–1178.

[71] *R.* v. *Rand* (1866) L.R. 1 Q.B. 230, where a justice announced his intention to convict any person who came before him on a charge of supplying liquor after permitted hours.

However attractive the presentation of Dr. Galeotti's case may be it cannot be regarded as a sound assessment of the processes behind the reasoning of the Lords in the *Stevenage* case. In spite of the difficulties attendant upon the categorisation of the administrative process involved in that case—and one must sympathise with Dr. Galeotti's difficulties over the spectral form of the quasi-judicial which looms up throughout the course of the case—it does not appear to be a sound conclusion that the exclusion of one of the component rules of natural justice by statute necessarily involves the exclusion of the other. The decisions are not particularly helpful on the point, but Dr. Galeotti's view is not supported by a study of them. It has been recognised that the content of the principle of natural justice may be either modified or abrogated entirely by statute[75]; and it seems difficult in these circumstances to escape the conclusion that a statutory exclusion of the rule against bias will operate against the principle of natural justice only *pro tanto*.[76] Much of the force of Dr. Galeotti's argument is lost when one realises that it is not the rule against bias of every possible kind which was regarded as inapplicable in the *Stevenage* case, but the challenge of the Minister's action on the ground of bias based upon his interest in the policy with the furtherance of which he had been entrusted in terms of the New Towns Act, 1946.[77] The rule requiring a full hearing of objections was not in question, since there was no attempt to challenge the proceedings at the inquiry held in terms of the Act into objections. The ground of challenge was that, before the inquiry was held (and indeed before the Act had been passed), the Minister had announced an unalterable intention to have a new town at Stevenage and that his mind was therefore closed to any considerations urged by the objectors at the inquiry.

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[72] *Judicial Control of Public Authorities in England and Italy*, by Dr. Serio Galeotti (Stevens, 1954), p. 180.

[73] *Franklin* v. *Minister of Town and Country Planning*, *supra*, note 66.

[74] 9 & 10 Geo. 6, c. 68 s. 1.

It is true that some of the reasoning in the House of Lords was devoted to establishing the proposition (to which Dr. Galeotti assents) that there was no room for a challenge of the Minister's decision on the ground that he was " biased " in favour of his own policy. It is also true that the Lords regarded the Minister's function in arriving at his decision as an administrative one rather than as partaking of any judicial or quasi-judicial character. The connection between these two propositions in the *Stevenage* case arises from the fact that they are deduced from the same set of circumstances, namely, the interpretation of the terms of the discretionary power of decision conferred upon the Minister under section 1 of the New Towns Act, 1946. There is nothing in the facts of the case, and (it is submitted) little in the dicta of the judges, to justify Dr. Galeotti's assertion that, having excluded the possibility of a challenge of the decision on the ground of bias, the judges regarded the principles of natural justice as necessarily inapplicable in their entirety and *for that reason* were driven to regard the Minister's exercise of power as administrative.

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[75] *Edinburgh University* v. *Craik*, 1954 S.C. 190, *per* Lord Cooper at p. 195; 1954 S.L.T. 45 at p. 48.

[76] Griffith and Street, *Principles of Administrative Law*, 2nd ed., p. 158.

[77] Though, if the Minister's discretion had not been conferred by statute in such absolute terms, and his function had been to adjudicate between a policy and the objections to it, his announcement prior to the holding of the inquiry of his decision might well have been compared to the announcement successfully complained of in *R.* v. *Rand* (*supra*, note 71).

But when that has been said, one is left with the uneasy feeling that, whatever the soundness of his approach, Dr. Galeotti has exposed the essentially unsatisfactory feature underlying the whole doctrine of natural justice. If it be accepted that " natural justice " is no more than an expression denoting two legal rules applicable, with or without modification, to proceedings of a judicial nature, is there any need for the use of this high-sounding but troublesome expression at all? If its legal content consists of (a) a requirement of unbiased decision, and (b) a requirement of a fair hearing to the parties to the dispute, there is something to be said for leaving the two requirements to speak for themselves and refraining from dignifying them with a compendious description such as " natural justice," with its open invitation to stray from purely legal to ethical considerations. For, if the rules are left to speak for themselves, some of the difficulties discussed in this article are removed. Judges, and others, would no longer be compelled to devote so much time to discussion of the exact content of a principle so curiously vague in its description. There would no longer be any necessity to make the painful mental adjustment required in accepting the fact that a principle expressed in such universal terms as " natural justice " may vary markedly in its application to differing cases. It is, after all, difficult to accept that a principle of natural justice may be modified by considerations of contract—or even by statute, because it is still unknown for Parliament to have declared in set terms in any statute that the principle of natural justice shall not apply. What has been done is to construe from the general words of the statute the intention of Parliament that application of the principle should be modified or abrogated. Eschewal of the expression " natural justice " would also be not without value in allaying the apprehensions of erudite foreign observers of our system, like Dr. Galeotti, and lastly, and perhaps comprehensively, would state the law in terms suitable for legal discussion.

Much anxiety has been expressed—and rightly expressed —as to the protection to be afforded in future by this principle. Mr. Wade [78] considers that the difficulty should be solved by a revision of our thinking upon the type of exercise of power to which the principle should be applied. It is no longer good enough, in his opinion, to apply the principle to acts of an administrative nature, since this involves a false dilemma between judicial and administrative. " The real question is," he asserts, " Is this administrative power one which deprives some individual of his rights or liberties so that he must be given the elementary justice of a hearing before his rights are destroyed by administrative action? "

Professor Keeton, after a careful examination of the varying expositions of the principle in the search for a generally accepted criterion for the legal content of the expression, concludes [79]: " Whether the standard be natural justice, substantial justice,[80] or what is fair and reasonable, matters very little, so long as the courts are watchful that individual rights are not trampled upon by the unfettered and arbitrary exercise of powers, and that a man should not be deprived of his livelihood without recourse to a proceeding before an independent tribunal bearing some recognisable resemblance to the proceedings of the ordinary courts."

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[78] " The Twilight of Natural Justice " (1951) 67 L.Q.R. 103 at p. 108.

[79] " Natural Justice in English Law "—*Current Legal Problems*, 1951, p. 41.

[80] Or, presumably, Mr. Wade's variant, " elementary justice."

Mr. Wade is considering natural justice in relation to administrative powers, and Professor Keeton, while ranging further in his exposition, is also particularly concerned with this aspect.

It is a constant misfortune to be encountered in the study of such difficult questions that those who have proved one's most reliable and stimulating mentors are often those with whom the disciple, at the end of the day, is compelled to differ. No one can but assent to the result which both Mr. Wade and Professor Keeton wish to see achieved. For my part I would also assent, with, perhaps, minor reservations, to Mr. Wade's strictures upon the approach to the problem through the rather dilapidated structure of reasoning based upon classification of powers as administrative or judicial. But does the content (the " generally accepted criterion ") of natural justice suggested by Mr. Wade or Professor Keeton afford any real hope of a solution of the difficulties which have already been experienced in applying the principle to such cases? In the present constitutional framework of this country, how is such an overriding principle as is propounded by these writers to be enshrined in our law as sacrosanct from modification or abrogation by Act of Parliament? If our approval of the liberal approach shown by Professor Keeton is sufficiently enthusiastic to enable us to ignore the delicate poise required of a judge in deciding when a citizen's rights are being trampled upon and when they are being removed or interfered with in a manner which, alas, has now become too familiar to excite comment, it is still difficult to see how a court of law may apply the rules of natural justice to an " unfettered and arbitrary exercise of power " if, in fact, the enabling statute has conferred a power of that very kind upon the person exercising it. It may be conceded that the courts can assist considerably, if they do not too readily credit Parliament with the intention of bestowing unfettered powers upon Ministers and others; and it is encouraging to see a trend in this direction.[81]

Whatever the change in judicial attitude to statutes purporting to modify the application of the principle of natural justice, the courts cannot apply such a criterion as Mr. Wade or Professor Keeton suggests, in direct opposition to the statutory words or to the inescapable interpretation to be placed upon them. The future of the principle will not, therefore, be secured merely by attempting to state it in wider or more general terms. It may be not without profit, however, to reverse the process; for, if we exclude from our thought the ethical, or rhetorical, overtones of the expression and confine ourselves instead to thinking of its two component rules as substantive and independent rules of law, we are in a position to assess more clearly and more immediately the extent of an invasion by Parliament of the rules in any given case. Our condemnation may not have much influence upon our legislators but at least it will not be less influential because it is clearly perceived and promptly expressed.

J. BENNETT MILLER.

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[81] *Rice* v. *Commissioner of Stamp Duties* [1954] 2 W.L.R. 460; *Francis* v. *Yiewsley and West Drayton U.D.C.* [1957] 2 Q.B. 136, *per* McNair J. at p. 148.

CASES AND COMMENT

1. SCOTTISH CASES

QUASI-JUDICIAL TRIBUNAL—Natural justice—Jurisdiction of court.

McDonald and Others v. *Lanarkshire Fire Brigade Joint Committee*, 1959 S.L.T. 309, emphasises yet again the need for tribunals to act judicially and to observe due procedure. Three firemen brought actions to have reduced decisions of a committee of the defenders imposing stoppages of pay of £5 each. The relevant discipline regulations prescribed the procedure for informing an accused fireman of the charge against him and for the hearing of the case. It was admitted that copies of the reports in the several cases were not communicated to the firemen until shortly before the hearing though they could have been sent out earlier, that the firemen's friend was denied an adjournment of the hearing when he requested it, and that one case was disposed of in the absence of the accused.

The first point was that of the jurisdiction of the Court of Session, which Lord Guthrie held would have had to be ousted by express provision in the regulations and had not been so ousted—(*quaere*, could it have been ousted by mere *regulations*?); in any event the actings were of a quasi-judicial tribunal of the kind repeatedly recognised as amenable to the supervisory jurisdiction of the court. That being so, and the defenders being admittedly in breach of a regulation regarding procedure, they had no defence to the pursuers' claim, and reduction of the illegal penalties was accordingly decreed. It is to be hoped that some day it will be appreciated by all who have to perform quasi-judicial functions, such as the committee in this case, that regulations designed to ensure a fair hearing must be observed, and it is disappointing that this lesson has not yet been fully learned by members of the public. That, however, emphasises the importance of the court's powers in such cases.

D. M. W.

ALIMENT—Whether adulterous wife entitled.

Donnelly v. *Donnelly*, 1959 S.L.T. 327, decides what may at first sight appear unfair, but what is truly no more than common sense and justice. A wife sued her husband for aliment; she had been put out of the house, it was averred, for adultery. This she did not deny. Could she recover aliment even though the husband was not bound to adhere to her? It was held that she could, and the Second Division, in reaching this decision, did much to clarify the law on this matter which is in an unnecessarily confused state. Surprisingly enough, this precise point was unprecedented. The leading principle was that the husband must aliment his wife, so long as she remained his wife. If she committed a matrimonial offence, he might rid himself of the liability by divorcing her, but short of that, the liability subsisted. It certainly subsisted, if the husband obtained merely decree of separation. In the second place, an award of aliment in the present case was held to be one of *interim* aliment, and therefore competent in the Sheriff Court, in that the only awards of "permanent aliment" would be those made following on a decision on the status of the parties. It necessarily follows that a so-called award of *interim* aliment may subsist for a long period, in that the parties might live out their lives in this state of *de facto* separation, but no time limit could reasonably be set on such an award, as the husband could not be compelled to bring an action of separation or divorce.

D. M. W.

JURISDICTION—Sheriff court and juvenile court.

The jurisdiction of the Sheriff Court to deal with juveniles in a district where a juvenile court had been established was discussed in *W. and G.* v. *C.*, 1959 S.L.T. 349. Two boys were charged with theft at Ayr, a county in which a specially constituted Justice of the Peace Court to deal with juveniles had been established by an order of the Secretary of State in 1937. In Bills of Suspension and Liberation it was contended that this juvenile court had exclusive jurisdiction and consequently that the Sheriff had gone beyond his jurisdiction in dealing with the case, albeit he had sat under the juvenile court procedure. It was held that the jurisdiction of both courts was concurrent, but that where a special juvenile court had been established, cases should be taken in that court unless the Crown Office had approved of the case being taken before the Sheriff, since otherwise there might develop a disparity of treatment in the district between cases taken by the Sheriff and cases taken by the juvenile court. Stress was laid on the fact, which may well be overlooked, that a juvenile court is not a separate judicial organ but merely a special function of the Justice of the Peace Court, specially constituted and with special procedure. That being so, the ordinary rule applied, that the Sheriff had concurrent jurisdiction with every other court of summary jurisdiction, including the Justice of the Peace Court, in both its ordinary and juvenile court aspects.

D. M. W.

JUSTICIARY —Contempt of court.

The case which has aroused greatest public interest in recent months has undoubtedly been *Stirling* v. *Associated Newspapers and Another*, 1960 S.L.T. 5. A newspaper published a photograph of a man who had been detained in England on a charge of murder committed in Scotland, and two articles about him and about the crime, which contained statements purporting to have been made by persons likely to be witnesses at the trial. The accused petitioned the High Court to have the newspaper prohibited from publishing any article or comment relating to the crime likely to prejudice him or to prevent his receiving a fair trial.

The High Court ordered the editor to appear in person at the bar and the newspaper to appear by solicitor and counsel. At the hearing the Lord Advocate also appeared. After hearing argument, the High Court found that the articles complained of constituted contempt of court and imposed fines of £500 on the editor and £5,000 on the proprietors. The Lord Justice-General, delivering the opinion of the court, took the opportunity to formulate general principles for the conduct of newspapers in such circumstances, which are likely to be of considerable value and importance in future.

In the first place he pointed out that the court must protect the right of the accused to a fair trial, whether the objectionable publication is made after arrest and before committal, or after committal for trial, and in both cases the test is the same.

Secondly, the freedom of the Press cannot be allowed to degenerate into licence, into " trial by newspaper " which might result in a jury being empanelled with their minds already affected, possibly even hopelessly swayed, by what they had read. The investigation of crime, the court pointed out, is the duty of the police and the Crown authorities, and not one to be conducted by a newspaper for the interest of its readers. " Any independent interviewing of possible witnesses by representatives of the Press while the investigations by the Crown authorities are in progress constitutes interference with the authorities' public duty and will usually impede their investigations, as the Lord Advocate has pointed out. If the result of these interviews is published in the Press before the trial is over, this may well constitute contempt of court."

The publication of photographs was also mentioned as likely to be prejudicial, since identification might well be a serious matter in issue at the trial. But in the circumstances of the case the most prejudicial matter consisted of the article written around the photograph disclosing certain matters liable to figure in evidence at the trial.

This important judgment has since been applied and amplified in a later and possibly even more flagrant case, in which also the publication of a photograph figured.

Inevitably there will be difficulties in particular circumstances in deciding how far a newspaper's quest for information and its desire to give its readers exclusive news can be pressed but it is desirable that the official investigation should not in any way be hindered and that nothing be done to prejudice an accused person unfairly.

D. M. W.

NEGLIGENCE —Mines and Quarries Act— Standard of duty.

Parliament, in imposing statutory duties of care, too frequently does not make absolutely clear what standard of duty is imposed, whether a duty to take reasonable care, or a strict duty, or an absolute duty, to implement the duty in question. In *Hamilton* v. *National Coal Board*, 1960 S.L.T. 24, the House of Lords, reversing the Second Division, has held that the duty of maintenance of machinery and apparatus in a mine under section 81 (1) of the Mines and Quarries Act, 1954, is absolute. The case turned entirely on the interpretation to be put on the words "properly maintained," and the interpretation put on the words by the House is consistent with that put on the same phrase in other statutory contexts *in pari materia*, such as the Factories Acts.

The observations of their lordships indicate that the absolute duty is the prima facie interpretation in all the cases where the statute says "maintained." It is satisfactory to note that the House declined to draw narrow distinctions between "maintained" and "properly maintained" and between cases where there was and cases where there was not a statutory definition. Such distinctions would have been merely confusing, and the decision arrived at in this case is the sensible and simple answer.

D. M. W.

2. ENGLISH CASES

Baker v. *T. E. Hopkins & Son, Ltd.* [1959] 1 W.L.R. 966, raises interesting questions of causation and remoteness of injury.

NEGLIGENCE
Forbidden Act —Rescuer— Remoteness of Injury.

Two of the defendants' workmen were instructed to clear water out of a deep well by means of a petrol pump set on a platform considerably below ground level where there was no ventilation to clear away the dangerous fumes it generated of carbon monoxide gas. After the pump had been started the defendants' managing director, who had not at first considered the dangers involved, did become aware of the danger of fumes and said to the workmen, "Don't go down the well tomorrow until the fumes have cleared." Next day, before joining the men after another appointment, he said "Don't go down that b—— well until I get there." Despite these instructions the men went down the well, were overcome by fumes, and died. A doctor was then summoned and, although warned by bystanders of the danger, insisted on being lowered down the well on the end of a rope to see if he could revive the men. When he began to be overcome by the fumes they attempted to raise him but the rope caught on some projection leaving him amidst the gas where he also died. The plaintiffs in the case were his widow and executors claiming damages against the defendant company.

The first question to be decided was whether the defendants were in breach of duty to the two employees so causing their death. It was not in dispute that using the petrol engine in the manner described above was a dangerous system of work, but the question was whether their disobedience of orders was the real cause of the accident. It was held that the imprecise nature of the instructions, which carried no warning of the dire consequences which would befall the men if they went down the well, was not enough to absolve their employers from blame and that it was the dangerous use of the petrol engine which was the real cause, or one of the material causes, of the accident.

The question then arose whether Dr. Baker's death was a reasonable and probable consequence of this initial act of negligence. It was held, following *Haynes* v. *Harwood* [1935] 1 K.B. 146, that it was. Munro L.J. quoted the words of Cardozo J. in *Wagner* v. *International Railway Co.* (1921) 232 N.Y.Rep. 176, 180: "Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognises them as normal. It places their effect within the range of the natural and probable. The wrong that imperils life is a wrong to the imperilled victim: it is a wrong also to his rescuer."

The sequence of legal propositions requiring proof is taken from the opinion of Morris L.J. and the rubric, but it is respectfully submitted that they are not the correct sequence—mixing up as they seem to do the independent questions of remoteness of injury and remoteness of damage. These questions also tended to become intermingled in the case of *Malcolm* v. *Dickson*, 1951 S.C. 542, 1951 S.L.T. 357. The report in *Baker*, however, appears to have been confused owing to conjoined actions by the employees' relatives not otherwise referred to in the report. The real question in the case of *Baker* was whether the defendants had been guilty of negligence *towards* Dr. Baker, not whether his death was a natural consequence or a reasonable and probable consequence of their negligence towards their employees. It is the case of remoteness of injury proper as in *Bourhill* v. *Young*, 1942 S.C.(H.L.) 78; 1943 S.L.T. 105. Whether damage is too remote a consequence of an initial act of negligence (and here the English and Scottish tests are probably different) can only refer to damage to the persons initially injured, not damage to someone else to whom an independent duty of care must be owed.

It is not suggested that the result in *Baker* should have been otherwise than it was. Objection is only taken to the manner in which the case is reported without making it clear that part of the findings refer to the other actions. The same principles apply as in *Malcolm*. In the latter case the defendants were not in breach of duty to Malcolm because it was not a reasonably foreseeable consequence of their carelessly setting fire to a house that he would rush in to rescue property and die as a result of his exertions through having a weak heart. In *Baker* it was a reasonably foreseeable consequence of the defendants carelessly sending their workmen to work under circumstances where they were likely to be overcome by dangerous fumes, that some third party would be equally overcome in trying to rescue them.

W. A. E.

REMOTENESS OF DAMAGE—
Expenses incurred by third parties—
Mental shock.

The case of *Schneider* v. *Eisovitch* [1960] 2 W.L.R. 169, raises interesting questions of remoteness of damage. As a result of the defendant's negligent driving the plaintiff's husband was killed in a motor-car crash in France, she being also an occupant of the motor-car. She was rendered unconscious by the crash and was conveyed to a French hospital. She later raised an action for damages for personal injuries in which she sought *inter alia* to recover £110 expenses incurred by her brother-in-law and his wife when they flew out to France to convey her back to England and to make arrangements for her husband's burial. It was held in the first place by Paull J. that these expenses were recoverable in respect that (a) the services were reasonably necessary as a result of the defendant's wrongdoing, (b) the expenses were reasonable in amount and would have been incurred if her friends had not assisted, and (c) the plaintiff undertook to pay the sum awarded to the persons concerned.

The plaintiff also claimed damages for shock due to her husband's death including the shock of discovering in hospital, when someone told her, that her husband had been killed. As she was rendered unconscious by the accident she did not know this at the time. Mr. Justice Paull said: " Once a breach of duty is established the difference between seeing and hearing is immaterial. Hearing can be just as direct a consequence as seeing. The fact that, owing to unconsciouness in this case, a period of time elapsed before the news was heard, makes no difference provided that the news was a consequence which flowed directly from the breach of duty towards the plaintiff; any more than it makes any difference that an operation takes place after an interval of time. The fact that the defendant by this negligence caused the death of the plaintiff's husband does not give the plaintiff a cause of action for the shock caused to her; but the plaintiff, having a cause of action for the negligence of the defendant, may add the consequences of shock caused by hearing of her husband's death when estimating the amount recoverable on her cause of action."

W. A. E.

LIBEL—Absolute privilege—Disciplinary Committee of the Law Society.

Addis v. *Crocker* [1959] 3 W.L.R. 527 shows how the defence of absolute privilege may be extended to statutory tribunals. The disciplinary committee of the Law Society of England, constituted under the Solicitors Act, 1957, inquired into allegations of professional misconduct on the part of a certain solicitor whom they absolved from blame. But they also made certain statements in their findings relating to another party. He brought an action against the committee alleging that these findings were defamatory. It was held that the inquiry of the committee, which was a statutory one and was in the nature of judicial proceedings, was absolutely privileged and no action for defamation would lie in respect of any of their findings.

W. A. E.

NULLITY OF MARRIAGE—Jurisdiction.

It is by no means certain that the Scottish courts will entertain jurisdiction to nullify a void marriage merely on the ground that it was celebrated in Scotland. But that the converse is firmly established as the law of England is apparent from the recent case of *Hill* v. *Hill* [1959] 3 W.L.R. 828. In that case a wife petitioned the English courts to declare her marriage null and void on the ground of her husband's incapacity. The husband was resident in and domiciled in Scotland. The action was defended by the Queen's Proctor on the question of jurisdiction but it was held that it was well established that the celebration of a marriage in England gave the court jurisdiction in nullity suits in which the marriage was void, such jurisdiction being derived from the practice of the ecclesiastical courts, which knew no distinction between void and voidable marriages so far as jurisdiction was concerned.

W. A. E.

EMPLOYERS' BREACH OF STATUTORY DUTY—Plaintiff's own fault—effective cause of accident.

It must be extremely rare these days for a plaintiff to be regarded as the sole cause of his own accident albeit his employers were in breach of a statutory duty. But this was the finding of Ashworth J. in *Rushton* v. *Turner Brothers Asbestos Co., Ltd.* [1960] 1 W.L.R. 96, where the learned judge refused to apportion liability. The plaintiff suffered an injury whilst operating a crushing machine which was unguarded contrary to section 14 (1) of the Factories Act, 1937. The machine was fitted with grooves which were cleaned by means of a knife when the machine was stationary. The plaintiff injured himself by attempting to clean the machine, contrary to express instructions, whilst it was in motion using his fingers for the purpose and not the knife.

W. A. E.

3. PRIVY COUNCIL CASES

LOANS TO BUSINESS CUSTOMERS: Not within Moneylending Ordinance.

Official Assignee of the Property of Koh Hor Khoon and Others, Bankrupts v. *Ek Liong Hin, Ltd.* [1960] 2 W.L.R. 250, was an appeal from a judgment of the Court of Appeal of Singapore reversing a judgment of the High Court of Singapore. The trial judge found that " there is no suggestion that the defendant company's [the respondents'] primary object is moneylending—in fact they are rubber merchants and shippers—and the only question for determination is whether [certain] loans were made in the course of their business and for its purposes." On that question the courts in Singapore had disagreed. The High Court held that the respondents were moneylenders, the Court of Appeal that they were not. It was common ground that, if the respondents were held as a result of the answer to the question to be moneylenders, the present appeal should be allowed; but that, if they should be held not to be, it should be dismissed.

The primary business of the respondent company was that of rubber merchants and shippers. They had a rubber estate and ships which plied between Singapore and Indonesia. They also had a godown storage department as a facility for their customers, and started as an additional facility to make loans to selected customers on the security of goods stored in their godowns. The loans were made to retain the existing customers and to gain fresh ones, and thus to preserve and advance the business previously done. The respondents did not advertise that they were willing to lend money.

The respondents made loans to a firm on the security of goods stored in the godowns. Later, the firm encountered financial difficulties and the respondents sold the goods and credited the money from the sale against the loans. Thereafter a receiving order was made against the firm and its members were adjudicated bankrupt. The appellant, as official assignee of the bankrupt's property, brought an action alleging that the respondents were moneylenders within the meaning of the Moneylenders Ordinance (Laws of the Colony of Singapore, 1955 ed., c. 193), and claiming the return of the goods or their value on the ground that, when dealing with the firm, the respondents had not complied with the formalities required by the Ordinance. Section 5 of the Ordinance set out what a moneylender must do before he could enforce a contract for repayment against a borrower. By section 2, "'moneylender' shall include every person whose business is that of moneylending . . . but shall not include . . . (*d*) any person . . . bona fide carrying on any business not having for its primary object the lending of money, in the course of which and for the purposes whereof he lends money . . ." The relevant part of the definition was the same as that in section 6 of the English Act of 1900. The respondents admitted that the formalities required by section 5 were not observed, but denied that they were moneylenders.

The Board stated that the moneylending transactions could not properly be regarded as a separate business. They were undertaken in the course of the previous business and as a part of its previous activities as a whole. It also appeared from the evidence that they were undertaken by offering facilities to retain the existing customers and to gain fresh ones, and thus to preserve and advance the business. The trial judge was of the opinion that there was not sufficient material on which he could accept the correctness of the view which, as a matter of business judgment, the company held, that if the moneylending transactions had not been undertaken some of the customers might have ceased to do business with the company in spheres (other than that of moneylending) such as shipping. In the Board's opinion the correctness of the view which the company held was immaterial to their case. The important thing was that it was genuinely held. If it was, then the moneylending transactions were carried out with the object of preserving and advancing the business and therefore for the purposes of the business. The trial judge refused to accept the correctness of the view which the company held, but he did not hold, and the whole tenor of his judgment indicated that he would not have held, that the view was not genuinely held. Even if the view was incorrect, in the words of the Court of Appeal, " the evidence shows that the purpose of these loan transactions was to prevent [the respondents] losing customers to their competitors," and therefore they were undertaken for the purposes of the business. It would be most unsafe to hold that a business view such as the one mentioned was in fact incorrect without very much more investigation than had taken place. And, as already stated, correctness was immaterial so long as it was genuinely held. The trial judge seemed to have thought that the words " for the purposes whereof he lends money " indicated that the money lent must have been lent for the purposes of the primary objects of the business. The Board did not think that that was the true construction of section 2 (*d*) of the Ordinance. " Whereof " referred to the business and not to the primary objects. It was sufficient in their opinion that the moneylending transactions were undertaken genuinely for the purposes of the business, that was, with the object of preserving, advancing or otherwise assisting the business, and not necessarily in connection with its primary objects. The appeal was accordingly dismissed.

Furber v. *Fieldings, Ltd.* (1907) 23 T.L.R. 362, approved. *Edgelow* v. *MacElwee* [1918] 1 K.B. 205, considered.

DELEGATION: "Duty" interwoven with "power."

Edward Liso Mungoni v. *Attorney-General of Northern Rhodesia* [1960] 2 W.L.R. 389, was an appeal from a judgment of the Federal Supreme Court of Rhodesia and Nyasaland [which was the first appeal to the Board from that court] allowing the appeal of the present respondent from a judgment of the High Court of Northern Rhodesia awarding the present appellant £25 as damages for wrongful imprisonment. The appellant was an African resident in Northern Rhodesia. The Federal Supreme Court, in reversing the decision of the High Court, held that the appellant had not been wrongfully arrested or detained. He appealed to Her Majesty in Council, asking not only that the judgment in his favour should be restored, but also that damages should be increased because, he said, the sum of £25 was inadequate.

By regulation 16 (1) of the Emergency Powers Regulations, 1956, of Northern Rhodesia: " Whenever the Governor is satisfied that for the purpose of maintaining public order it is necessary to exercise control over any person, he may make an order . . . against such person directing that such person be detained." By regulation 47: " The Governor may . . . depute any person . . . to exercise all or any of the powers conferred upon the Governor by these regulations. . . ." On September 11, 1956, the Acting Governor of Northern Rhodesia made a proclamation in which he said that he was satisfied that a public emergency existed, and he proclaimed that the Orders in Council concerned with emergencies should have effect in the Western Province of Northern Rhodesia. On the same day he issued emergency regulations which gave the authorities wide powers, and in particular gave the Governor power to make detention orders. He also issued an instrument delegating many of his powers to the Provincial Commissioner of the Western Province. At the time when the emergency was declared the appellant, an official of the African National Congress, was living in the Western Province. On September 16, 1956, police officers arrested him at his house on a charge of breaking the Emergency Regulations by attending a meeting which had been prohibited. He was not tried on that charge because, later that day, the Provincial Commissioner made a detention order against him under regulations 16 (1) and 47. The order stated: " I am satisfied that for the purpose of maintaining public order it is necessary to exercise control over" the appellant.

The appellant, with fifty-three others, was taken to a detention camp. On November 2, 1956, the fifty-four detained persons applied for a writ of *habeas corpus ad subjiciendum* and the Chief Justice of Northern Rhodesia, on November 28, 1956, held that the detention orders were invalid and ordered that the detainees be discharged forthwith. They were so discharged, but the Governor of Northern Rhodesia himself immediately made restriction orders against them. The restriction order against the appellant, dated November 28, 1956, prohibited him from being in the Western Province except under written permit. That order was later continued by further orders, all signed by the Governor himself. In 1959 one of the restricted persons applied to the High Court in London for leave to issue a writ of *habeas corpus ad subjiciendum.* That court decided that it had no jurisdiction to issue the writ, but, on appeal, the Court of Appeal held that the courts had jurisdiction, though they did not determine whether it was proper to exercise it. A week later, on October 20, 1959, the Governor of Northern Rhodesia revoked the restrictive orders and the appellant thereupon became free.

The present appeal only concerned the period during which the appellant was detained under the detention order made by the Provincial Commissioner, that was, from 7.30 p.m. on September 16, 1956, to the time of his discharge on November 29, 1956.

The difference of opinion in the courts below arose on this: the Chief Justice of Northern Rhodesia, in the habeas corpus proceedings, and the trial judge in the present action for damages, following him, held that, for the detention order to be valid, it was the duty of the Governor of Northern Rhodesia himself to be satisfied that it was necessary to exercise control over the appellant. He could not delegate it. The Governor had not himself performed that duty, and the detention order was therefore invalid. But the Federal Supreme Court held that it was not necessary for the Governor himself to be satisfied. He could delegate that task to the Provincial Commissioner. He had so delegated it, and, inasmuch as that Commissioner was satisfied, that was enough and the detention order was valid.

The Board stated that the point at issue was to what extent, if any, the Governor could delegate his functions in respect of detention orders to the Provincial Commissioner. To enable him to delegate it was necessary to find some express authority in that behalf. Their Lordships recalled that in England the powers of the Secretary of State under regulation 18B were personal and could not be delegated (see *Liversidge* v. *Anderson* [1942] A.C. 206, at p. 265) : but in Northern Rhodesia the Emergency Regulations contained an express provision enabling the Governor to delegate his powers. The question was how far that enabled him to delegate his power to make detention orders. By regulation 16 (1) he could not make such an order unless he was first " satisfied " of what was there stated. In a sense that put a *duty* on him to be " satisfied " before he made an order. Could he delegate that duty ? Counsel for the appellant argued that he could not. The authority of the Governor to delegate, he said, applied only to *powers* and not to *duties*, and he based that on the words of Emergency Regulation 47 (see above) which defined the Governor's authority to delegate. He said that regulation 16 (1) contained a duty and also a power. The *duty* laid on the Governor was to be " satisfied " that it was necessary to exercise control over any person. The *power* was to make an order directing that such person be detained. The effect of regulation 47, he said, was to authorise the Governor to delegate his *power* to make an order, but it did not authorise him to delegate his duty to be satisfied.

The Board stated that the power and the duty under regulation 16 (1) were so interwoven that it was not possible to split the one from the other, so as to put the duty on one person and the power in another. Whoever exercised the power, he it must be who had to carry out the duty. In delegating his functions under regulation 16 (1) the Governor must be able to delegate both the power and the duty together to one and the same person. He could not delegate the power to another and keep the duty to himself. The power of the Governor to make a detention order could only be exercised when he was " satisfied " that it was necessary. The requirement that he was to be satisfied—though in one sense a duty—was nevertheless also a condition or limitation on the exercise of the power. And when regulation 47 authorised the Governor to delegate the power to any person it also authorised him to delegate to such person the fulfilment of all the conditions and limitations attaching to it, even although they were also duties. The reason why regulation 47 referred only to "powers" and not to "duties" was that the Emergency Regulations imposed no duties on the Governor *simpliciter*—nothing, for instance, which a mandamus would issue to command him to perform. The only duties on him were those which were appurtenant to powers conferred on him, and were in the nature of conditions or limitations on the exercise of the powers. All those could be delegated under regulation 47. Accordingly the detention order made by the Provincial Commissioner was valid, and the appeal would be dismissed.

LEASE OF CROWN LAND: whether "covenants" or "conditions of defeasance."

Sheik Mohamed Bashir v. *Commissioner of Crown Lands* [1959] 3 W.L.R. 996, was an appeal from a judgment of the Court of Appeal for East Africa allowing an appeal by the present respondent from a judgment of the Supreme Court of Kenya whereby the present appellant was granted, on conditions, relief from forfeiture to the respondent of certain land in Nairobi leased to him by Crown grant.

By the Crown Lands Ordinance, 1915 (Laws of Kenya, 1948, c. 155), section 83: ". . . if there shall be any breach of the lessee's covenants . . . the Commissioner may serve a notice upon the lessee specifying . . . the covenant of which a breach has been committed, and . . . may commence an action in the Supreme Court for the recovery of the premises, and, on proof of the facts, the Supreme Court shall, subject to relief upon such terms as may appear just, declare the lease forfeited. . . . In exercising the power of granting relief against forfeiture under this section the court shall be guided by the principles of English law and the doctrines of equity."

By a Crown grant dated January 8, 1953, the Governor of Kenya granted to the appellant a town plot in Nairobi for a term of ninety-nine years subject to a progressive rent, to the provisions of the Crown Lands Ordinance, and to a number of stipulations referred to in the grant as, and therein set out under the heading of, "Special Conditions." The grant was in the form prescribed for a form of Crown grant of land for a term of years by section 21 of and Form B (1) in the First Schedule to the Registration of Titles Ordinance, 1919, and was that of a deed poll as distinct from a deed *inter partes*. But it was not now disputed that, though made in that form and executed only by the Governor and not by the appellant, the grant constituted in law a lease from the Governor to the appellant for the term and at the rent therein mentioned, and was subject to all provisions of the relevant ordinances applicable to such leases. The first of the special conditions provided that the grantee should within thirty-six months erect an hotel at a specified cost and in compliance with particularised specifications, the other special conditions being expressed for the most part in such a way as to impose an imperative obligation on the appellant to perform and observe them. The appellant admittedly failed to erect any buildings on the plot within the prescribed time, and the respondent began proceedings claiming, in effect, possession of the plot on the ground that the stipulation contained in paragraph 1 of the special conditions was a condition of the lease constituted by the grant the non-fulfilment of which entitled him to treat the lease as avoided. The appellant contended that the special conditions were, and were to be construed as, covenants, and claimed that he should be granted relief under section 83 of the Ordinance of 1915.

The Board stated that, on construction and in the light of the relevant legislation, the special conditions set out in the grant would have constituted covenants within the meaning of section 83 of the Ordinance of 1915—as distinct from and contrasted with conditions of defeasance—in a lease *inter partes* under that Ordinance. Did that conclusion as to the effect of the special conditions if they had appeared in a lease *inter partes* hold good with respect to those same conditions when included, as they were, in the grant under consideration, being a grant operating as a lease but made as a deed poll in form B (1) prescribed by the Registration of Titles Ordinance, 1919? By section 20 of that Ordinance " all land which is comprised in any grant issued subsequent to the commencement of this Ordinance shall be subject to this Ordinance. . . . " The Board came to the conclusion that, on accepting the lease and going into possession under it, the appellant contracted obligations to observe and perform the special conditions, which amounted to covenants for the purposes of section 83. The court, accordingly, had jurisdiction to grant relief from forfeiture under section 83 of the Ordinance of 1915. Reverting to the possibility that the special conditions might be regarded as possessing the dual character of covenants and conditions, the Board stated that, in their opinion a stipulation of that combined character would nevertheless be a covenant within the meaning of section 83, and the remedy by way of forfeiture (subject to relief) conferred by that section would (*quoad* forfeiture) be exhaustive and exclude any other mode of enforcing forfeiture for breach of the stipulation in question.

The effect of the second paragraph of section 83 was that, where a case for forfeiture (subject to relief) had been made out under the first paragraph of the section, the court, in determining whether relief should be granted and, if so, on what terms, was to be guided by the principles on which the English courts exercised their power of granting relief under the English statute law relevant at the date when the Ordinance came into operation, and by the doctrines of equity. That meant, in effect, that the court was to be guided (which did not mean necessarily bound) by the principles laid down by section 14 (2) of the Conveyancing Act, 1881, and the decisions of the English courts, so far as applicable to a case under section 83 and by the doctrines of equity.

The appeal was allowed and the case remitted to the Court of Appeal for Eastern Africa to hear and determine grounds of appeal contained in 2, 3 and 4 of the Commissioner's memorandum of appeal to that court (ground 1 referred to jurisdiction), and also the Commissioner's application to adduce fresh evidence bearing on those grounds.

Dedhar v. *Commissioner of Lands* [1957] E.A.C.A. 104, approved.

4. REPORT

SEVENTH REPORT of the Law Reform Committee for Scotland.

The Seventh Report of the Law Reform Committee for Scotland (July 1959—Cmnd. 907) contains recommendations relating to actions in the Sheriff Courts between spouses concluding for payment of aliment. The principal recommendations are as follows:

(1) that section 42 of the Sheriff Courts (Scotland) Act, 1907, be amended so as to stipulate that the provisions of the Small Debt Acts shall extend and apply to actions for aliment alone between husbands and wives where the aliment claimed does not exceed £5 per week

for the wife (or husband, as the case may be) and £1 10s. per week for each child;

(2) that, for the removal of doubt, in the amendment to section 42 of the said Act recommended above it be expressly declared that in undefended actions for aliment alone in which the amount claimed is limited as above, a proof should not be required; and

(3) that section 6 of the said Act be amended so as to confer jurisdiction in such actions upon the sheriff court within whose jurisdiction the pursuer resides, where the defender resides in Scotland but within the jurisdiction of a different sheriff court.

These recommendations follow upon the decision of the Second Division of the Court of Session in *Donnelly* v. *Donnelly*, 1959 S.L.T. 327, that "interim aliment" within the meaning of section 5 (2) of the said Act (as amended by the Sheriff Courts (Scotland) Act, 1913) includes all awards of aliment other than those coupled with decrees of separation or of adherence. In that case the Division held that an action at the instance of a wife against her husband for an award of aliment alone for "so long as he shall refuse to receive and entertain her as his wife" was competently brought in the sheriff court as an action for "interim aliment." The Court of Session has long made awards of aliment alone subject to the limitation beforementioned and the decision in *Donnelly* confirms the effect of the Sheriff Courts Acts as being to confer upon the sheriff in all aliment actions concurrent jurisdiction with the Court of Session.

The Lord Advocate no doubt anticipated an increase in the number of aliment actions in the sheriff court as a result of *Donnelly* and remitted to the Law Reform Committee for consideration the question of whether changes in the law were required to simplify procedure in such actions where the amount claimed was small. The sheriff court practice is to hear evidence in actions for interim aliment between spouses, even if they are undefended, on the ground that they are "consistorial actions" as defined in section 19 of the Conjugal Rights (Scotland) Amendment Act, 1861. Since 1934, however, in the Court of Session such an action has been treated as an ordinary action (Rules of Court, III, 170), and decree in absence may be pronounced accordingly. The existing sheriff court procedure must cause hardship in many cases. The recommendations of the Committee that aliment actions between spouses within the limits stated should proceed as small debt actions and that proof should be dispensed with in undefended actions are well designed to achieve the object in view which the Committee assumes to be " that of providing an expeditious and inexpensive form of process whereby a wife in necessitous circumstances may secure financial provision " for herself and for her children.

The figures of £5 and £1 10s. per week are those recommended in the Report of the Royal Commission on Marriage and Divorce (Cmd. 7678, Recommendation No. 67), where the suggestion that small debt procedure should be applied to aliment actions was originally made. The Royal Commission, however, recommended the application of small debt procedure to all actions between spouses containing a conclusion for aliment, including actions of separation and of adherence, subject to conditions not present in small debt actions, *videlicet* (a) that there must be proof whether the action is defended or not, and (b) that there should be the right of appeal on questions of law by way of stated case to the Court of Session. The Committee concluded that the proposed simplified procedure would not be appropriate for actions of separation and aliment because a decree of judicial separation affects the *status* of the parties and may be treated in a subsequent divorce action as sufficient proof of the adultery or cruelty in respect of which the decree was granted (Divorce (Scotland) Act, 1938, s. 4). The Committee also excluded from their recommendations actions of adherence and aliment because they are consistorial causes and there is no need for a spouse to seek a decree of adherence except for the purpose of founding upon it in subsequent divorce proceedings for desertion. The recommendation of the Law Reform Committee is to be preferred to that of the Royal Commission because it enables a spouse in need of aliment to obtain an award quickly and cheaply in a simple action for aliment. If the cause is not defended there is no necessity for proof. Further, a provision for appeal on a question of law is thought to be otiose and, in view of the limit on amount and of the fact that any award may be reviewed in the light of changed circumstances, hardship is unlikely to arise by the absence of a right of appeal on fact.

At the present time the sheriff has jurisdiction in actions of interim aliment: (1) under section 6 (*a*) of the Sheriff Courts (Scotland), Act, 1907 (as amended by the 1913 Act) on the ground of the defender's residence within his sheriffdom (as to which see *Findlay* v. *Donachie*, 1944 S.C. 306; 1944 S.L.T. 367, and *M'Cord* v. *M'Cord*, 1946 S.C. 198; 1946 S.L.T. 209); and (2) under section 6 of the Maintenance Orders Act, 1950, where the wife is the pursuer residing within the sheriffdom, and the husband is resident in England or Northern Ireland, and the parties last ordinarily resided together as man and wife in Scotland. An action for aliment alone is a petitory action and it is submitted that jurisdiction may be founded upon other paragraphs of section 6 of the Sheriff Courts Act, *e.g.*, paragraphs (*b*)—place of business and (*c*)—arrestment within the jurisdiction. (As to reconvention, see the opinion of the Lord Justice-Clerk (Cooper) in *Kitson* v. *Kitson*, 1945 S.C. 434, at p. 438; 1946 S.L.T. 109 at p. 113). Neither under the Sheriff Courts Act nor under the Maintenance Orders Act, 1950, has a sheriff power to entertain an aliment action against a spouse who is resident in Scotland but outwith his sheriffdom. Additional expense and delay arise through such actions having to be raised in the sheriffdom where the defender is resident. If the amount claimed is small, the action may well be undefended. The final recommendation of the Committee—*videlicet*, that it shall be competent for the pursuer to bring such an action in a court of the sheriffdom where the pursuer resides, with qualification as to the parties having last resided in that sheriffdom—is consistent with the desirable object of assisting a pursuer to obtain an award of aliment for herself or himself, as the case may be, and children of the marriage, within the limits stated, with the minimum trouble and expense.

A. M. J.

CURRENT PERIODICAL LITERATURE

By K. W. B. MIDDLETON, B.A., LL.B., Advocate, Sheriff-Substitute of the Lothians and Peebles

LIABILITY WITHOUT FAULT

Kensington Borough Council v. *Walters*[1] arose out of a collision between two motor-cars, resulting in damage to the plaintiff council's street refuge. The defendant, the driver of one of the cars, was not in any way responsible for the collision, by which his car was thrown against the street refuge. He was, however, sued by the local authority in virtue of section 181 (3) of the London Government Act, 1939, which provides that "If any person accidentally or carelessly damages any property vested in a local authority, the authority may recover from him summarily as a civil debt the expenses incurred by it in making good the damage." The County of London Justices accepted the defendant's contention that Parliament could not have meant to make a completely innocent person liable by this section, but the Divisional Court allowed the appeal of the local authority, on the ground that the wording of the statute was clear and that the hardship of the result on the defendant could not be taken into consideration.

An editorial note in the *Law Quarterly Review* for January 1960, comments on what is described, without much exaggeration, as "this extraordinary provision," and suggests that the literal interpretation of the section adopted by the Divisional Court was not perhaps inevitable. If Parliament had intended to impose liability on a person who caused damage without any blame on his part, there would have been no purpose in providing at the same time that he should also be liable if he did so "carelessly." It might therefore have been possible to regard the words as reading "accidentally *and* carelessly" rather than "accidentally *or* carelessly."

Could the defendant, however, properly be said to have damaged the local authority's street refuge at all? If a golfer slices a shot and sends his ball through a window of an adjacent house, he may be said to have damaged the property accidentally. Now the defendant's car was in just the same position as the golf ball. It was propelled against the street refuge by an external force coming into contact with it. Surely it was the negligent driver of the other car who damaged the street refuge, not the defendant, who had nothing whatever to do with the occurrence, except that he happened to be sitting in a car by the instrumentality of which the negligent driver caused the damage. The Lord Chief Justice appeared to think that the transitive verb "damages" is to be distinguished from the phrase "causes damage to." Can the first mean anything more, or less, than the second? The ordinary meaning of "accidental" in such a context is "unintentional," not "involuntary," yet the Divisional Court interpreted the section as if it had read, not "accidentally or carelessly," but "involuntarily or carelessly." The hypothetical golfer breaks the window accidentally and unintentionally. In the same way the negligent driver damaged the street refuge accidentally and unintentionally. Not so the defendant, whose act, if he could be said to have acted at all, was simply involuntary.

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[1] [1959] 3 W.L.R. 945.

If *Kensington Borough Council* v. *Walters* were merely another case illustrating the possibilities of semantic confusion, it would be of limited interest. The issues involved, however, are of ultimate legal importance, since they bear on the nature of a basic concept on which legal rules depend, that is to say on liability. It is a primary purpose of rules of law, civil or criminal, to establish liability. They are concerned not with physical things but with persons, more properly with moral persons, who are alone capable of making or intending and therefore of incurring liability. The law does not care whether windows are broken or street refuges damaged in themselves, only whether or not any person becomes liable as a result. "Liability" means legal responsibility, and is without doubt closely akin to, though not necessarily coincident with, responsibility in a more general sense, in particular ethical responsibility. Normally a rule of law either corresponds to a rule of morality or at least supplements or reinforces it. If we find that there is a direct contradiction between them we at once suspect that something is wrong somewhere. That a man should be held liable for damage to property which has occurred in circumstances where he is completely free from blame seems morally shocking and also legally anomalous. It was only because the Divisional Court in *Kensington Borough Council* v. *Walters* conceived itself bound by the express terms of an Act of Parliament that it decided the case as it did. "If that is the law," says the layman, "the law ought to be changed." "If that is the law," the lawyer says, "I agree with you. But before we conclude that Parliament committed such a gross error, we had better consider very carefully whether Parliament really intended what it appeared to say. Perhaps it did, or perhaps, on the other hand we may, with great respect, suggest that the Divisional Court misinterpreted its intention."

"There is an age-long conflict of theories," observed Lord Simonds in *Read* v. *J. Lyons & Co., Ltd.*,[2] "which is to be found in every system of law. 'A man acts at his peril,' says one theory. 'A man is not liable unless he is to blame,' answers the other. English law," he went on, "has adopted a compromise between these two extremes." There appears, however, to be one shining exception in an unregenerate, or at least Laodicean, world. "In Scotland, at any rate, it has never been a maxim of the law that a man acts at his peril. Legal liability [for unintentional wrongdoing] is limited to those consequences of our acts which a reasonable man . . . would have in contemplation."[3] Thus there is no duty to insure others against injury, only to take care not to injure them. Reparation may be claimed where injury is inflicted either by unlawful acts, or by lawful acts performed without due care, and not otherwise. The law of

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[2] [1947] A.C. 156, 180.

[3] *Muir* v. *Glasgow Corporation*, 1943 S.C.(H.L.) 3, *per* Lord Macmillan at p. 10; 1944 S.L.T. 60.

Scotland has been so stated by high authorities, from Lord President Inglis [4] to Lord President Cooper.[5] The textbooks firmly reiterate and emphasise the view of these authorities.[6] Yet there have been heretics all along, and it cannot be said that the matter is free from difficulty, if, indeed, this is not an understatement.

Controversy has ebbed and flowed mainly round *Rylands* v. *Fletcher*[7] and the question whether, or how far, the principle of absolute, or rather strict, liability laid down by that case applies to Scotland. The rule in *Rylands* v. *Fletcher*, however, relates only to the escape of dangerous things from land where the land is put to a non-natural use,[8] and may be confined to a rather small class of cases, even though the decision of the House of Lords in *Caledonian Ry.* v. *Greenock Corporation*[9] renders it impossible to argue that there can never be strict liability in Scotland in such circumstances.

The question is, are there other instances of strict liability in our law, or is *Rylands* v. *Fletcher* an equally unique and unwelcome intruder? To begin with, it is relevant to point out that *Rylands* v. *Fletcher* was preceded by a Scottish case, *Kerr* v. *Earl of Orkney*,[10] in which the facts were not precisely the same but in which a rule apparently identical in principle was enunciated. *Kerr* v. *Earl of Orkney* was considered in two other cases [11] before the decision in *Rylands* v. *Fletcher* and was approved by the House of Lords in one of them. There was nothing therefore in *Rylands* v. *Fletcher* in itself to surprise or disturb Scots lawyers. The rule in *Kerr* v. *Earl of Orkney* further resembles that in *Rylands* v. *Fletcher* since both allow an exception to liability where the injury is caused by *damnum fatale*, or Act of God.[12] A similar defence is open under the rule borrowed by Scots law from the Praetorian Edict, *Nautae, Caupones, Stabularii*, imposing strict liability on common carriers and others for loss of goods entrusted to them, whether with or without negligence.[13] This, again, is a somewhat special branch of law, which need not perhaps affect any general theory about the basis of liability.

The law of nuisance, on the other hand, is not so easy to dispose of. Here we have a rule, or system of rules, closely akin to the rule in *Rylands* v. *Fletcher* and *Kerr* v. *Earl of Orkney*, but of wider scope. It is settled that absence of negligence is not a defence to an action for nuisance.[14] The usual distinction drawn between injury arising from nuisance and actionable injury arising from the use of property in general is that nuisance is itself illegal and not merely an illegal mode of executing a lawful operation.[15] The distinction however between an illegal act and an illegal method of performing a legal act is in any event of dubious value. In the case of nuisance it seems to be certainly unsound, as the very words of the maxim *sic utere tuo ut alienum non laedas* show. A proprietor may enjoy his property as he wishes, provided he does not so " use his property as to create that discomfort or annoyance to his neighbour which interferes with his legitimate enjoyment." [16] Just as negligence in law means, not simply carelessness, but carelessness that causes injury to another, so nuisance consists, not in carrying on an operation which involves, for instance, the emission of noxious fumes, but in doing so in a manner and to an extent that causes substantial injury to another. Accordingly, it is not possible to enumerate particular kinds of use to which property is put and to say, this use is legal and that use, since it amounts to a nuisance, is illegal. It is really the mode of use that constitutes the illegality, or rather, it is the result that is produced by the mode of use which renders that mode of use illegal. Besides, it is of no importance whether the interference with another's enjoyment consists in committing an unlawful act, or in committing a lawful act in a wrongful manner. The result is the same either way.[17] In *Watt* v. *Jamieson* [18] it was argued that an action for nuisance will not lie in Scotland when the type of user complained of involves only a normal, natural and familiar use of property. The argument was rejected by Lord President Cooper, who held that the proper angle of approach in a case of nuisance is from the standpoint of the victim rather than of the offender, and that it is not a defence for the latter to show that he was making a normal and natural use of his property, if in fact the former has suffered serious disturbance or material loss. Liability for nuisance therefore is strict, for it depends on the injurious consequences of an activity, which may yet be both lawful and natural in itself and carried on with due care.

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[4] See *Campbell* v. *Kennedy* (1864) 3 M. 121, 126; *Laurent* v. *Lord Advocate* (1869) 7 M. 607, 610; *Mackintosh* v. *Mackintosh* (1864) 2 M. 1357, 1364.

[5] See *McLaughlan* v. *Craig*, 1948 S.C. 599, 610, 1948 S.L.T. 483.

[6] *Encyclopaedia of the Laws of Scotland*, vol. 12, pp. 487 *et seq.*; *Glegg on Reparation*, 4th ed. pp. 18 *et seq.*

[7] (1865) 3 H. & C. 774; (1868) L.R. 3 H.L. 330.

[8] *Read* v. *J. Lyons & Co., Ltd.*, *supra*.

[9] 1917 S.C.(H.L.) 56, 1917, 2 S.L.T. 67.

[10] (1857) 20 D. 298.

[11] *Tennent* v. *Earl of Glasgow* (1862) 1 M. 133, (1864) 2 M.(H.L.) 22; *Potter* v. *Hamilton & Strathaven Ry.* (1864) 3 M. 83.

[12] *Caledonian Ry.* v. *Greenock Corporation*, *supra*; *Nichols* v. *Marsland* (1875) L.R. 10 Ex. 255, 2 Ex.D. 1.

[13] *Mustard* v. *Paterson*, 1923 S.C. 142, 1923 S.L.T. 21; *Burns* v. *Royal Hotel (St. Andrews), Ltd.*, 1958 S.C. 354, 1958 S.L.T. 309.

[14] *Slater* v. *A. & J. McLellan*, 1924 S.C. 854, 1924 S.L.T. 634.

Another instance of strict liability is afforded by what is called " statutory negligence "; that is to say, liability may follow from breach of a statutory provision which can be construed as imposing a duty owed to a particular class of persons, without need to prove negligence apart from the breach. The breach is to be regarded as *per se* negligence.[19] All that the pursuer has to show is (a) that a statutory duty of this kind applies to the case, (b) that the defender was in breach of it, and (c) that the breach of duty caused or indirectly contributed to the loss or damage complained of.[20] The phrase, " statutory negligence " is perhaps apt to mislead. In the first place, the " right to recover damages is not created by the statute but by the common law, the function of the statute being merely evidential, in prescribing certain measures of precaution the non-observance of which *per se* infers negligence."[21] Even the evidentiary function of the statute is an invention of the courts, who have developed the rule as a gloss on penal provisions contained in the Factories Acts, etc., mainly in order to mitigate what they felt to be the unfair consequences of the doctrine of common employment. Thus it is a mistake to look on the rule as a contamination of the pure theory of the common law by an interfering legislature, actuated by considerations of policy or the like. Secondly, negligence which is inferred *per se* by the fact of breach of a statutory provision is an imputed, or fictitious, negligence. What the rule does is to treat as negligence something that is not necessarily negligence at all. It does not matter whether an employer, for example, where a breach has occurred of a safety measure laid down for the protection of workmen in his factory, has taken every practicable precaution against the breach. He is liable none the less.

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[15] *Glegg on Reparation*, 4th ed., p. 323.

[16] *Fleming* v. *Hislop* (1886) 13 R.(H.L.) 43, *per* Lord Fitzgerald, at p. 48.

[17] *Edinburgh Railway Access & Property Co., Ltd.* v. *John Ritchie & Co.* (1903) 5 F. 299.

[18] 1954 S.C. 56, 1954 S.L.T. 56.

[19] *McMullan* v. *Lochgelly Iron & Coal Co., Ltd.*, 1933 S.C.(H.L.) 64, 1934 S.L.T. 114.

[20] *Bonnington Castings, Ltd.* v. *Wardlaw*, 1956 S.C.(H.L.) 26, 1956 S.L.T. 135.

It is sometimes maintained[22] that the conjunction of a very high standard of duty and readiness to presume fault in some circumstances from the occurrence of damage is sufficient to explain cases like *Kerr* v. *Earl of Orkney*,[23] *Chalmers* v. *Dixon*[24] and *Caledonian Ry.* v. *Greenock Corporation*.[25] No doubt there are dicta which lend support to this view.[26] But the grounds of decision in the cases mentioned are quite inconsistent with presumed negligence. If strict liability amounts to no more than an inference or presumption of negligence, then it must be a good defence that in fact there has been no negligence. Of course, where a dangerous operation is carried on, the duty of care is high and it may even be that the onus of proof will shift to the defender to show that no negligence occurred. Yet, unless absence of negligence is irrelevant or negligence is imputed by law, it is impossible that the defender should be deprived of the opportunity to escape liability by proving that he exercised all the care expected of a reasonable man in the particular circumstances. This is precisely what the rule in *Kerr* v. *Earl of Orkney* declares he cannot excuse himself by doing. Wherever then a higher standard of care is required than that of an ordinarily prudent man, there must be a different and more stringent kind of liability than that which follows from negligence.

From a practical point of view much the most important instance where liability for unintentional wrongdoing is divorced from negligence is vicarious liability, and particularly the liability of a master for his servant's negligence within the scope of his employment.

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[21] *Wm. Hamilton & Co., Ltd.* v. *Anderson*, 1953 S.C. 129, *per* Lord President Cooper, at p. 137, 1953 S.L.T. 77.

[22] D. M. Walker, "Strict Liability in Scotland" (1954) 66 J.R. p. 231; *Glegg on Reparation*, p. 322.

[23] *Supra*.

[24] (1876) 3 R. 461.

[25] *Supra*.

[26] *e.g.*, *Moffat* v. *Park* (1877) 5 R. 13, *per* Lords Ormidale and Gifford; *Miller* v. *Robert Addie & Sons' Collieries*, 1934 S.C. 150, *per* Lord Justice-Clerk Aitchison and Lord Murray, 1934 S.L.T. 160; *McLaughlan* v. *Craig*, 1948 S.C. 599, *per* Lord President Cooper, 1948 S.L.T. 483.

A very large number, possibly even a majority, of reparation cases that come before courts of law invoke this principle. A theory of liability that does not account for it can hardly be regarded as satisfactory. To impose liability upon one man because another has been negligent, whatever explanation is attempted for the rule, remains an anomaly and a profound mystery to those who believe that negligence is the sole basis on which in principle he ought to be rendered liable.[27]

Do the instances of strict liability mentioned (and they are not exhaustive) show that liability without fault must be regarded as an integral part of our law? The answer to that question perhaps depends on whether " fault " in the phrase " liability without fault " is to be identified with " negligence " or not. Consider the reason for which liability was imposed on the defender in *Kerr's* case. " If a person chooses upon a stream to make a great operation for collecting and damming up the water for whatever purpose, he is bound . . . to accomplish his object in such a way as to protect all persons lower down the stream from all danger." [28] He was made responsible, not merely because his dam gave way, but because he had *chosen* to create a risk of harm to other people. He could be said to be blameworthy in so far as he deliberately did something which he either foresaw, or ought to have foreseen, *might* be dangerous. Otherwise there could be no blame, since nobody can guard against something that he cannot foresee. But while there was fault, there could not be said to be negligence, except in a loose sense of the word, for one is negligent if one fails to have regard to what a reasonable person expects *may* happen, not to what he imagines *might* happen.

Strict liability can be reconciled with the principle of no liability without fault only if fault, or *culpa*, and negligence can be distinguished from one another. It is necessary to recognise the existence of a variety of *culpa* which consists in creating a hazard, or initiating an activity which is potentially harmful to others. Absence of negligence is not a defence in this case, for *culpa* is involved in deciding to start the potentially harmful activity, not merely in failing to exercise due care once the decision to start it has been made. All, or nearly all, instances of strict liability can be brought within such a principle of liability. When, for example, an employer, instead of taking his lorry out himself, sends his driver on to the road for the purposes of his business, he is necessarily imperilling the safety of other road users, since he is bound to foresee the possibility of his servant driving carelessly and causing damage, whatever precautions the master may take to prevent this from happening. It is useless to maintain that the master's duty is fulfilled if he takes due care to employ only careful drivers and to give them proper instructions. Accidents will still occur even though he does. Why should it not be just for the master to incur liability for damage caused by the servant's negligence? It is true the master cannot avoid the damage after he has sent the servant on to the road, but he was not bound to send him at all. He chose to take the risk with his eyes open.

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[27] See *Kilboy* v. *South Eastern Fire Area Joint Committee*, 1952 S.C. 280, *per* Lord President Cooper, at p. 285, 1952 S.L.T. 332.

[28] *Supra*, *per* Lord Justice-Clerk Hope, at p. 302.

In *Chalmers* v. *Dixon* [29] Lord Justice-Clerk Moncreiff said that the question was whether a man who conducts an operation on his own property, lawful in itself but which has a tendency to ignore his neighbour, is liable for any injurious results without specific fault being alleged or proved. This question he answered in the affirmative, provided that the defender brings on his land something that "creates a hazard which did not exist before." It is well known that in all countries in modern times the problem of reconciling the principle of no liability without fault with the need to give compensation to victims of industrial and traffic accidents has caused controversy. In France, for example, the courts, by a liberal interpretation of a provision in the Civil Code which had for long been of little importance, have evolved a doctrine of "*risque créé*," imposing strict liability on persons having a responsibility for dangerous things.[30] It would indeed be strange if the same need had not been felt in Scotland, and *Chalmers* v. *Dixon* demonstrates that the courts had already by 1876 found the solution in a principle of "created hazard" which is an exact translation of the French phrase "*risque créé*."

Mr. W. A. Elliott has pointed out in reference to *Chalmers* v. *Dixon* [31] that the principle of created hazard means, not that a blameless man is held to act at his peril, but that if a man consciously imperils others by taking a risk, he will be treated as responsible should the risk materialise, even though it does not happen through his immediate carelessness. "Liability on this basis," he continues, "clearly embodies the traditional conception of moral blameworthiness, and standards of conduct which underlie the principle of *culpa*." Mr. Elliott thinks that the extension of the rule laid down in *Kerr* v. *Earl of Orkney* and *Chalmers* v. *Dixon* has somehow been frustrated in our law owing to a confusion arising from the case of *Rylands* v. *Fletcher*. But how could that be, seeing that the English rule is precisely the same, at least so far as the principle of liability apart from negligence is concerned? The real villain who confused the issue, if such a term may be used without irreverence, was Lord President Inglis. In a series of cases between the date of *Kerr* v. *Orkney* and that of *Chalmers* v. *Dixon* [32] he expressed the opinion in unqualified terms that liability, where a person exercises an undoubted legal right, depends solely on negligence. These dicta received little support, if any, from his fellow judges in the Inner House. In *Laurent's* case, for instance, Lord Deas flatly denied that any such rule could be laid down. Lords Ardmillan and Kinloch agreed on this point with Lord Deas, and the remaining member of the First Division, Lord Ormidale, preserved a prudent silence, while concurring with the Lord President. In other cases in the sixties and seventies,[33] in both Divisions where a similar issue arose, the judges, even when they did not expressly found on the rule in *Kerr* v. *Earl of Orkney*, apparently assumed that it was a correct statement of the law. If it was, then the dicta of the Lord President could scarcely be. At all events, whatever doubt remained should have been (but was not) dispelled by the decision of the House of Lords in *Caledonian Ry.* v. *Greenock Corporation.*[34] It is true that this case was concerned only with flood damage caused by interference with the natural course of a stream, but it seems unreasonable not to regard the express approval of Lord Justice-Clerk Hope's statement of the law in *Kerr's* case as an implicit approval also of Lord Justice-Clerk Moncreiff's more general formulation in *Chalmers'* case. According to Glegg[35] the decision in the *Greenock* case can be explained on the basis of *culpa*. So it may, if *culpa* means the creation of a hazard. On the other hand, there was no question of negligence on the part of the Corporation in the execution of the works from which the damage resulted.

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[29] *Supra*, at p. 463.

[30] Amos and Walton, *Introduction to French Law*, 262.

[31] "What is *Culpa*?" (1954) 66 J.R. 6, 26.

[32] *Mackintosh* v. *Mackintosh*, *supra*, *Campbell* v. *Kennedy*, *supra*, *Laurent* v. *Lord Advocate*, *supra*.

[33] *Potter* v. *Hamilton & Strathaven Ry.*, *supra*; *Pirie* v. *Mags. of Aberdeen* (1871) 9 M. 412; *Wilsons* v. *Waddell* (1876) 3 R. 288, 4 R(H.L.) 29.

The objection to Lord President Inglis' dicta in *Mackintosh* v. *Mackintosh*, *Campbell* v. *Kennedy*, and *Laurent* v. *Lord Advocate* is that his opinion is expressed too categorically. It is undeniable that *culpa*, in the sense of negligence, is normally required to establish quasi-delictual liability. And it must be conceded that liability in Scots law cannot flow *ex dominio soli*. This has recently been reaffirmed by the Second Division in *Thomson* v. *St. Cuthbert's Cooperative Assoc., Ltd.*[36] There is, however, a great difference between the following two propositions: (a) that a proprietor has a positive duty to discover and remedy any defect in his property, latent or not, which might injure others; and (b) that he has a duty not to initiate potentially harmful operations, or bring potentially harmful things on to his premises, which he knows, or ought to know, might injure others in spite of reasonable precautions taken by him. The first of these propositions may well be unfounded, while the second may be correct. The exclusion of liability *ex dominio soli* goes no further than to negative the first.

Apart from the difference of judicial opinion revealed in *Laurent* v. *Lord Advocate*,[37] the case is unsatisfactory, and it is strange it should be regarded as a leading case on the liability of landowners who carry out building operations.[38] The First Division there held that evidence of inconvenience and injury to amenity, with consequent loss of custom, caused by work done on his premises by a proprietor was not sufficient, in the absence of any evidence of want of care or skill in the conduct of the work, to substantiate a claim for damages at the instance of the occupier of an adjacent restaurant. The case appears to have been plainly one of nuisance, but it was not argued or decided on that basis, as Dr. Gow has observed,[39] and his criticism of it seems to be justified. Circumstances very similar to those in *Laurent's* case came before the Second Division some years later in *Cameron* v. *Fraser*,[40] where the decision went the other way. The ground of judgment, as stated by Lord Young, appears at first sight to have been negligence, and the court took pains to avoid coming to a conclusion openly inconsistent with the *ratio* in *Laurent*. "A person executing operations on his property, however lawful and reasonable they may be," said Lord Young, "must take care in conducting them to do as little damage as possible to his neighbour." The damage caused by the defender, however, was not, in the opinion of the court, unavoidable, and consequently he was found liable.

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[34] *Supra.*

[35] p. 21.

[36] 1958 S.C. 380, 1959 S.L.T. 54.

[37] *Supra.*

[38] *Glegg*, p. 317; A. D. Gibb, *Select Cases on the Law of Scotland.*

[39] "Is *Culpa* Amoral?" (1953) 65 J.R. 17, 25.

[40] (1881) 9 R. 26.

It is necessary to look into the facts of this case with some care. The work was executed by an independent contractor not under the control of the defender, and when the action was brought in the Sheriff Court the contractor was sued in addition. It was found in the Sheriff Court that the contractor had not performed the work unskilfully and he was exonerated. The appeal to the Inner House involved only the owner of the premises who had instructed the operation to be carried out. In those circumstances, assuming that the action was based on ordinary principles of negligence, the defender ought to have been acquitted of responsibility.[41] Accordingly, it appears that liability did not depend on negligence at all, and that the real *ratio* of the decision was that a person who undertakes a building operation which results in damage to the property of another is bound to make good the damage unless it amounts merely to the sort of inconvenience or discomfort which is inevitable where operations of the kind are carried out. In other words, the case was in effect decided on nuisance. If so, the ground of decision was not merely different from the ground of decision in *Laurent* v. *Lord Advocate*, but in conflict with it. In any event, it should be observed that Lord Young, who was the only member of the Second Division to give an extended opinion, expressly, though cautiously, dissented from the view maintained by the Lord President in *Laurent's* case, and took the side of Lords Deas, Ardmillan and Kinloch.

In his significant opinion in *Watt* v. *Jamieson*,[42] referred to above, Lord President Cooper remarked that nuisance, as a cause of action, is a comparatively modern development, at least in Scots law, and that in particular arguments founded on ". . . the older authorities, tended to confuse nuisance as a cause of action with *culpa* . . ." Two of the three cases specially referred to by him as "older authorities" were *Mackintosh* v. *Mackintosh*[43] and *Campbell* v. *Kennedy*.[44] He went on to say that the "modern view of nuisance is, I think, more accurately founded on such cases as *Broder* v. *Saillard*,[45] *Fleming* v. *Hislop*,[46] and *Sedleigh-Denfield* v. *O'Callaghan*."[47] It is worth noticing that two of these were English cases and that in the third it was laid down that there is no difference of principle between the English and Scots law of nuisance.[48] Is it far-fetched to draw from all this the inference that it has been largely thanks to Lord President Inglis that the development of the law of nuisance in Scotland has been slow and confused in the last 100 years? Lord President Cooper would surely have been almost the last to discard Scottish in favour of English precedent if he had not felt obliged to.[49] Among Scottish cases on nuisance which cannot be criticised on the ground of confusion between nuisance and *culpa* (*sc.* negligence) is *Inglis* v. *Shotts Iron Co.*[50] It is tempting to speculate whether the pursuer in that case ever felt inclined to regret some previous statements made by him in another capacity.

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[41] See *Stephen* v. *Thurso Police Comrs.* (1876) 3 R. 535.

[42] *Supra.*

[43] *Supra.*

[44] *Supra.*

[45] (1876) 2 Ch.D. 692.

[46] (1886) 13 R.(H.L.) 43.

[47] [1940] A.C. 880.

[48] *Per* Lord Fitzgerald at p. 48.

The confusion that needs to be avoided, it has been suggested above, is not that between *culpa* and nuisance, but between *culpa* and negligence. Dr. Gow has put forward the idea, for which there is much to be said, that the essence of the principle underlying separation is the distinction between the reasonable and the unreasonable exercise of a right.[51] A person may exercise his rights as he chooses, within certain limits determined by the rights of other persons. That is in effect to assert that he must do so reasonably in regard to others, and if he does not it may be said that there is *culpa*. (a) To cause injury to others intentionally or wilfully is one way of exercising one's rights unreasonably. (b) To fail to take due precautions against injuring others is another way. But these are not the only two possible varieties of *culpa*. (c) Rights may be exercised in such a manner that injury to others occurs, although there is neither intention that such a result should follow nor lack of due precaution to prevent it following. It is no use quarrelling about words, of course. If anyone wishes to use the word "negligence" to cover the instances of *culpa* contained in both class (b) and class (c), he is free to do so. The consequence, however, is to place more weight on the concept of negligence than it can easily bear. It invokes the use of the single word "negligence" in a number of different and even inconsistent senses. Does it conduce to clearness of thought, for example, to say that a person who has built a dam across a stream has been negligent in one respect, because he has failed to provide against an unprecedented fall of rain, and yet in another respect has not been negligent, because he has taken every precaution to make his dam safe that a reasonably prudent man in his position would have taken?

We may agree with Dr. Gow that if the law of reparation is to have a sound theoretical basis, negligence must be regarded as a variety of *culpa* and not identified with it. We are not bound to agree at the same time with him that *culpa* is "amoral" or that liability without fault is necessarily involved in the separation of *culpa* from negligence. In the interesting debate between Dr. Gow and Mr. Elliott[52] we may perhaps think that Mr. Elliott here has the stronger argument.

Liability without fault, or absolute liability, can only occur when a person is made liable for something in regard to which he is completely free from blame, which in other words was pure accident, or which he caused involuntarily. It does not by any means follow from the rule in *Rylands* v. *Fletcher* or *Kerr* v. *Earl of Orkney.* Blackburn J. in the former case made it clear that the responsibility of a person from whose land a dangerous thing escapes is only answerable prima facie for the damage ensuing. "He can excuse himself by showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of *vis major*, or the act of God."[53] He added that it was just and reasonable that, where he has brought something on his own property, harmless to others so long as it is confined to his own property, but *which he knows to be mischievous* if it gets on his neighbour's, he should be obliged to make good the damage that results if *he does not succeed* in confining it to his own property. So too in *Kerr* v. *Earl of Orkney* it is implied by the judgment of the Lord Justice-Clerk[54] that the person who constructs a dam knows (or ought to know) that the operation involves risk to the safety of others, and incurs liability for that reason. And, again, liability may be excluded by a *damnum fatale*.

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[49] See his opinion in *McLaughlan* v. *Craig*, *supra*.

[50] (1881) 8 R. 1006; (1882) 9 R.(H.L.) 78.

[51] "Is *Culpa* Amoral?," *supra*, at p. 35.

[52] "Is *Culpa* Amoral?," *supra*; "What is *Culpa*?," *supra*.

What exactly constitutes an act of God, or *damnum fatale*, is no doubt a question which is not easy to answer. The House of Lords in the *Greenock* case[55] evinced a marked disinclination to define the concept. One who chooses to carry out a dangerous operation must be prepared, not indeed to guarantee the safety of others, but to give them something very near to a guarantee. He will not necessarily be excused by any amount of precautions, still less because he has taken "all the pains which were thought at the time necessary and sufficient."[56] Only some contingency which he can neither foresee nor guard against will, it would seem, allow him to avoid liability, and even so he must show, not only that a *damnum fatale* occurred, but that the consequences of the *damnum fatale* could not have been averted by him.[57] However small the loophole, it remains true that the blameless man has a way of escape. The size of the loophole naturally corresponds to the degree of risk which the operation involves. Hence probably the judicial reluctance shown in the *Greenock* case to define a *damnum fatale*, in case the result should be to weaken the protection afforded by the rule in *Kerr* v. *Earl of Orkney* to those exposed to injury by such an operation.

The fact that absence of negligence on the part of one who is responsible for a nuisance is not a defence to an action for damages does not necessarily mean that he is liable without fault. Regard, indeed, must be paid rather to the injury suffered than to the fault of the person who creates the nuisance, and he accordingly incurs prima facie liability from the circumstance that injury has been caused.[58] But he is not an insurer, and his liability is dependent on his having created it, or at least continued or adopted it when he might have remedied it.[59] There must be something more than the mere occurrence of the injury. Deliberate act or negligence is not an essential ingredient, "but some degree of personal responsibility is required."[60] It would seem to follow that inevitable accident, or *damnum fatale*, would be a good defence.[61]

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[53] L.R. 1 Ex. 265, 279.

[54] *Supra.*

[55] *Supra.*

[56] *Kerr* v. *Earl of Orkney*, *per* Lord Justice-Clerk Hope, *supra.*

[57] *Caledonian Ry.* v. *Greenock Corporation*, *supra*, *per* Lord Wrenbury, at p. 68; *Mustard* v. *Paterson*, *supra*, *per* Lord Anderson, at p. 156.

[58] *Watt* v. *Jamieson*, *supra.*

[59] *Sedleigh-Denfield* v. *O'Callaghan*, *supra.*

In the same way, some degree of personal responsibility is certainly involved in the case of a master who becomes liable for the negligent act of his servant within the scope of his employment. As for statutory negligence, it may be said that an absolute duty not to do something that constitutes a breach of a statutory provision is in certain circumstances laid upon employers and other persons. But it is incorrect to say that they become absolutely liable if a breach occurs, for a pursuer who invokes this rule must show that the breach actually caused the loss or damage complained of, and not, for example, his own failure to exercise proper care.[62] Moreover, the pursuer must be one of a class of persons whom the statutory provision was intended to protect, and consequently for whose protection the defender has some responsibility.

A right, Dr. Gow says, must be exercised reasonably, "not because it is wrongful if done unreasonably, but because it is or may be harmful."[63] But it should be borne in mind that there is a moral element wrapped up in the word "reasonable." Negligence, as Professor Montrose puts it, is an ethical concept.[64] The question, in deciding whether a man has acted with reasonable care, is not whether he has done something in conformity with what is done by most people, or even by all people, in similar circumstances. The question is, whether he has done what a reasonable person *ought* to do. It is important to distinguish between average practice and average standards, between what the ordinary man does and what he thinks he should do. The latter is the test which determines liability, not the former. "Even if it were proved that it is the general practice to neglect this danger, I would hold that it ought not to be neglected and that precautions should be taken."[65] Accordingly, an unreasonable act is an act which one ought to refrain from doing, and to exercise one's rights unreasonably in regard to others means that one is guilty of blameworthy conduct towards them.

Where a court of law has to determine liability for loss or damage, it must decide which of two contending parties should bear the loss, assuming that it cannot find a pretext for splitting the difference. Is the loss to remain where it fell, or is the other party to make it good? The answer must in general depend on whether one party is to blame, or is more to blame than the opposite party. On what other consideration could it depend, if the chief purpose for which courts exist is to do justice between man and man? And if that is not their purpose, just why should they exist at all? It is a dangerous argument to minimise in any way the essential issue of blame or absence of blame. The temptation may be strong, from sympathy towards one side perhaps, or again from considerations of expediency. To yield to it in any event is sure to lead to bad law.

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[60] *Sedleigh-Denfield* v. *O'Callaghan*, *supra*, *per* Lord Atkin, at pp. 896–897.

[61] *Winfield on Tort*, 6th edit., p. 607.

[62] *Caswell* v. *Powell Duffryn Collieries, Ltd.* [1940] A.C. 152, *per* Lord Atkin, at p. 164.

[63] *Loc. cit.*

[64] "Is Negligence an Ethical or a Sociological Concept?" (1958) 21 M.L.R. 259.

[65] *General Cleaning Contractors, Ltd.* v. *Christmas* [1953] A.C. 180, *per* Lord Reid, at p. 194.

The history of the rise and fall of the doctrine of common employment provides an illustration of the sort of danger that comes from allowing extraneous considerations to intrude. This unlamented doctrine seems to have originated in a well-meant desire on the part of the courts to lighten what was thought to be the excessively heavy burden placed on employers by the extension of their vicarious liability for the negligence of their employees. Although there might possibly have been some justification for it if it had been strictly confined within certain narrow limits, it was carried to such a length as to become both highly artificial and highly inequitable. Or at least this would have happened had the courts not by a series of decisions evolved rules designed to prevent employers from relying on the defence of common employment in various circumstances. Statutory negligence was one of the judge-made rules. Another means of excluding the defence was the imposition of common law duties on employers, not to be evaded by delegation, of providing a safe system of working, etc.

With the abolition by statute of the defence of common employment [66] a reaction perhaps began, and a number of cases have been decided in a sense more favourable to employers, who are no longer in the position of advantage which they held before the Act of 1948. Thus in *Davie* v. *New Merton Board Mills, Ltd.*,[67] it was held by the House of Lords, affirming the judgment of the Court of Appeal, and overruling the decision of the Court of Session in *Donnelly* v. *Glasgow Corporation*,[68] that an employer is not liable for an injury caused by a tool which he has bought from a reputable manufacturer and the defect in which is not discovered by reasonable inspection. The decision might possibly have gone the other way before the passing of the 1948 Act. "There is no longer the same sociological justification for pushing [the doctrine that an employer cannot escape liability by delegating certain cardinal duties laid on him personally] to what may have been its logical conclusion." [69]

Writing in the July 1959 number of the *Modern Law Review*,[70] Mr. C. Grunfeld deplores the tendency which he discerns in the last few years for the courts to reduce the area of employer's liability, and their insistence that the employer should not be liable for "negligence without fault" and the individual worker should bear the full responsibility for his own carelessness. The major pointers to this conclusion in his opinion are the cases of *Bonnington Castings, Ltd.* v. *Wardlaw*,[71] *Staveley Iron & Chemical Co., Ltd.* v. *Jones*,[72] *Lister* v. *Romford Ice and Cold Storage Co., Ltd.*,[73] and *Davie* v.

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[66] Law Reform (Personal Injuries) Act, 1948.

[67] [1959] A.C. 604.

[68] 1953 S.C. 107, 1953 S.L.T. 161.

[69] *Sullivan* v. *Gallagher & Craig*, 1960 S.L.T. 70, *per* Lord Justice-Clerk, at p. 76.

[70] 22 M.L.R. 428.

[71] *Supra.*

[72] [1956] A.C. 627.

[73] [1957] A.C. 555.

New Merton Board Mills, Ltd.[74] So much alarmed is Mr. Grunfeld by this trend away from "the idea of collective security" in employment accident cases that he thinks the whole question of the preventive and remedial aspects of industrial accidents, including protective legislation, common law actions for damages, and benefits under the National Insurance Acts, should be examined by an authoritative Committee or Commission.

The decisions which Mr. Grunfeld picks out as particularly deplorable no doubt suggest the fact of a reaction since the 1948 Act, although other recent decisions of the House of Lords in this branch of the law might be referred to as indicating at least some uncertainty in the trend he perceives.[75] However that may be, it is surely a strange complaint to bring against the courts that they are more anxious to reach a just solution than they were previously. Mr. Grunfeld's attitude appears to be that every case which is decided against the employer and in favour of the workman is a good decision, and vice versa. It would be very easy for courts to arrive at a correct conclusion in any litigation involving an employer and his employee if they were to adopt this mode of reasoning. Those who prefer a different approach will probably agree that *Davie's* case represents a "return to simplicity and first principles,"[76] and that a decision in the opposite sense would have been "a retrograde step towards the theory of liability without negligence."[77] There may be sound arguments for providing that all industrial accidents should be covered by an improved insurance scheme, affording more generous treatment to injured workmen than the existing National Insurance benefits. The courts could then be relieved of the task of dealing with these cases altogether. But unless and until some such change is made, they must continue to determine liability, and therefore to decide whether the accident occurred through the fault of the employer or through the injured workman's own fault. It is impossible, without perverting legal principle, to proceed on any other basis than the merits of the particular case before the court.

"Negligence" has a different meaning to a lawyer and to a layman. Similarly when we speak of "fault" or "blame" in a legal context we are not using the words in the sense of ordinary language. It is for this reason that the word "*culpa*" is useful, as denoting specifically legal fault. In ordinary speech there would seem to be some oddity in saying that a lorry owner is "blameworthy" because his driver carelessly runs into someone else's car, or a manufacturer of ginger beer because his employee allows a snail to get into one of the bottles. It is not, however, absurd to say that there is *culpa* in such circumstances on the part of the master as well as of the negligent servant himself. "*Culpa*" has a meaning different from "fault," because it is used for a special purpose, that is to say, in order to determine liability to make reparation. Conversely, there may be moral fault without legal fault. "Acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief."[78] Admittedly, the liability incurred as a consequence of *culpa* may be very disproportionate to the degree of *culpa*, but this is another story.

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[74] *Supra.*

[75] *e.g., General Cleaning Contractors, Ltd.* v. *Christmas, supra*; *National Coal Board* v. *England* [1954] A.C. 403; *John Summers, Ltd.* v. *Frost* [1955] A.C. 740; *Morris* v. *West Hartlepool Steam Navigation Co., Ltd.* [1956] A.C. 552; *Cavanagh* v. *Ulster Weaving Co., Ltd.* [1959] 3 W.L.R. 262.

[76] *Sullivan* v. *Gallagher & Craig, supra, loc. cit.*

[77] *Davie* v. *New Merton Board Mills, Ltd.* [1958] 1 Q.B. 210, *per* Parker L.J. at p. 239.

For all that, moral fault is inseparably connected with *culpa*. The ordinary person does not think that it is consistent with justice to impose liability without fault, and there is no reason for the lawyer to dissociate himself in this matter from the ordinary person, whom, indeed, he very much resembles. If "moral responsibility" is substituted for "blame" or "fault," then there is little difficulty in seeing the justice in certain circumstances of imposing strict liability. This is a very different animal from absolute liability, a more or less mythical beast which is supposed to have been kept from crossing to this side of the Border by Lord President Inglis. If not wholly mythical, it can be found lurking only in such nooks and crannies as the section of the London Government Act, 1939, which was the subject of consideration in *Kensington Borough Council* v. *Walters* (*supra*).

SUMMARIES

By S. G. Kermack, c.b.e., m.a., ll.b., Advocate, Sheriff-Substitute of Renfrew and Argyll at Oban

Accountancy

In *British Tax Review*, September—October 1959: "Accounting Profits and Tax Profits," by S. T. Crump.

American Law

In *Oklahoma Law Review*, August 1959, appears a symposium on Statutes of Limitations and Constitutional Limitations, including a contribution from Professor Maurice H. Merrill, Oklahoma.

In *Connecticut Law Journal*, June 1959, there appears a symposium on Evidentiary Privileges of Non-Disclosure. In the September issue of the same journal, "Connecticut Public Defenders," by Professor David Mars.

In *Public Law*, Winter 1959, "Freedom or Toleration (Church and State in the United States)," by Victor S. MacKinnon, University of Edinburgh.

In *New York University Law Review*, November 1959: "The Consumers of Injustice," by Professor Edmond Calne; "Congress Rehabilitates Modern Art," by Professor Derenberg and Daniel J. Baum.

In the *Canadian Bar Review*, December 1959, an interesting article on "The American Uniform Rules of Evidence (1953)," by Mr. R. Graham Murray, Halifax.

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[78] *Donoghue* v. *Stevenson*, 1932 S.C.(H.L.) 31, *per* Lord Atkin, at p. 44, 1932 S.L.T. 317.

In the *New York University Law Review*, December 1959, the Annual Survey of New York Law (318 pages); and in the January 1960 number, Annual Survey of American Law (258 pages).

The *Oklahoma Law Review* specialises naturally in the law of oil and gas and the September 1959 number deals with the "Regulation of Independent Producers," the "Implied Covenant of Future Development" and the distinction between "Surface" and "Mineral."

COMMON AND STATUTE LAW

In the *Modern Law Review*, September 1959: "Note on Section 14 (1) and (2) of the Sale of Goods Act," by A. D. Hughes, King's College, London; "The Adoption Act, 1958," by O. M. Stone.

In the *Law Quarterly Review*, October 1959: "Contracts with Companies, Part I," by Professor I. D. Campbell; "The Problems of Unfulfilled Promises," by Professor F. F. Stone.

In the *Canadian Bar Review*, December 1959, "Fallacy of the Transplanted Category," by Moffat Hancock, California, and "Accessio, Specificatio and Confusio," by R. B. Slater, Winnipeg.

In the *Modern Law Review*, November 1959, "The *Ratio* of the *Ratio Decidendi*," by Professor Julius Stone, University of Sydney.

In the *British Tax Review*, November–December 1959, "Retrospective Fiscal Legislation," by Eric Fletcher, LL.D., M.P.

In the *Modern Law Review*, January 1960, "Wilful Neglect to Maintain a Wife," by L. Neville Brown, University of Birmingham; "Problems of the Collecting Bank," by Gordon Borrie.

In the *Law Quarterly Review*, January 1960, "Migration of the Common Law," a series of introductory talks featured in the Overseas Service of the B.B.C. and now reproduced, covering the U.S.A., Australia, India, Israel, Republic of Ireland and Canada. Also Professor I. D. Campbell concludes his article on "Contracts with Companies."

COMMONWEALTH AND DEPENDENT TERRITORIES

In *Public Law*, Autumn 1959: "Constitution of the West Indies," by J. C. McPetrie.

In *Canadian Bar Journal*, October 1959: "Conditional Sale Agreements," by J. M. Goldenberg, Q.C.

In *Public Law*, Winter 1959: "The South Australian Local Government Act, Section 676 (attrition of the citizens' Rights)," by Howard Zelling, University of Adelaide; "The African Affairs Board," by A. C. Macdonald, Resident Magistrate, Nyasaland.

CRIMINAL LAW

In *Connecticut Bar Journal*, June 1959: "Establishment of Criminal Responsibility," by John Donnelly, M.D., Hartford, Conn.

In *Modern Law Review*, November 1959: "Validity of Case Law under a Criminal Code" (citing the Tasmanian Criminal Code), by Henry Calvert.

In *Law Quarterly Review*, January 1960: "The Guilty Mind in the Criminal Law," by Professor J. C. Smith.

FOREIGN AND COMPARATIVE LAW

In *Public Law*, Autumn 1959: "The French Constitution, 1958," by William Pickles.

In *British Tax Review*, July–August 1959, "European Fiscal Systems—France," by E. B. Nortcliffe; in the September–October number of the same *Review*, "European Fiscal Systems—Western Germany," by the same author.

In the *Law Quarterly Review*, October 1959: "Patent Rights in an Employee's Invention (American and British views)," by Professor C. Robert Morris, Jr.; "Civil Liberties in Europe," by Norman S. Marsh.

In the *Revue International de Droit Comparé*, October–December 1959, "An Important Stage in Soviet Legislation," by Mr. Kudrjavcev, Substitute of the Procureur-General of the U.S.S.R.; "Theory of Human Rights in Moslem Law," by Edmond Rabbath, Advocate, Beirut; "Evolution of Family Rights in Canada and England," by Professor Ian Baxter, Osgoode Hall, Toronto.

In the *British Tax Review*, November–December 1959, Mr. E. B. Nortcliffe's final article on "European Tax Systems, with suggested lessons for the United Kingdom."

In the *Modern Law Review*, January 1960, "Fundamental Principles of Soviet Criminal Law," by Boris S. Nikiforov, Institute of Juridical Sciences of the U.S.S.R.

INTERNATIONAL LAW

In the *American Bar Association Journal*, October 1959: "Military Law Abroad: The Status of Forces Agreement in England," by Major Earl Synker, U.S. Air Force.

In the *American Journal of International Law*, October 1959, Professor Hans Wehberg, Secretary-General of the Institute of International Law, writes generally on "*Pacta sunt Servanda.*" On arbitration, Mr. Allen Sultan, University of Chicago, on "United States Policy and the United States Convention thereon"; Mr. Martin Domke on "The Israeli-Soviet Oil Arbitration." Michael Lander, Whewell Scholar of International Law on "The Act of State Doctrine." The text of the Statute and other documents relating to the Organisation for European Economic Co-operation is produced in the *Journal*.

In the *Modern Law Review*, November 1959, "Act of Nationalisation in International Law," by Professor Konstantin Katzarov, formerly of Sofia University.

LEGAL HISTORY

In the *Law Quarterly Review*, October 1959, "Law Reform under the Commonwealth and Protectorate," by G. B. Nourse.

LITERATURE AND LAW

In the *American Bar Association Journal*, November 1959, Richard Bentley, of the Illinois Bar sums up the Shakespearian controversy, started in February in the *Journal* ("the competence and validity of evidence").

PARLIAMENT

Public Law, Autumn 1959: "Use of Committees by the House of Commons," by Messrs. Hanson and Wiseman.

In *Western Political Quarterly*, September 1959, "Conflict of Interest, English Experience 1782–1914," by Murry McGill.

SCOTS LAW

In the *Conveyancing Review*, November 1959, "Restrictions on Use in Dispositions," by Professor John M. Halliday, Glasgow; "Inherent Conditions of the Feu," by the Editor, Mr. Alfred I. Phillips.

SOCIAL SCIENCE

In the *Western Political Quarterly*, December 1959, "Political Science and the Practical Problem of Peace," by Professor George Catlin, McGill University.

Periodicals also received: *La Justícia* (*Mexico*), *Jus* (*Milan*), *Documentation Juridique Étrangère* (*Brussels*), *Revista del Foro* (*Lima*).

RECENT LITERATURE

The Scottish Legal System. An Introduction to the study of Scots Law. By David M. Walker, M.A., LL.B., PH.D., Q.C., Advocate and Barrister-at-Law, Regius Professor of Scots Law in the University of Glasgow. 1959. Edinburgh: Green & Son, Ltd. 50s. net.

To those who were introduced to Law by plunging straight into "Little Erskine," it is interesting to peruse this new and more scientific method of approach which Professor Walker has elaborated for the student, following modern ideas about the teaching of the subject. It must be sound, as the author says in the Preface, "to acquaint the student at the very outset of his studies with the legal materials and the methods of working, with the basic knowledge and background required to enable him intelligently and profitably to pursue legal studies." While this is its main object, it would be unjust not to point out that it provides to a considerable extent a compact method for the intelligent layman to get a view of his legal system, material which, though not now quite so scarce as when Lord Macmillan commented in the Stair Society's first volume on its absence, still left room to be filled.

As a pioneer attempt to formulate an introductory course, it must have required considerable thought as to arrangement, and as to what was to be concluded, what left out. The author's selection seems to meet the case. The first two chapters provide the student with the background knowledge of Jurisprudence and Roman Law which is necessary before proceeding to the study of his own law or to the more intensive study of these subjects themselves. He has postponed till Chapter 5 the subject of Sources of Law, which is usually treated as a jurisprudential topic, but as he considers it from the point of view of the actual sources as exemplified in Britain, this is probably a justifiable course.

Chapter 3 is devoted to the history of Scots Law under the title of the Scottish Legal Tradition. This interesting survey extends to nearly a third of the book and is a new departure in a Scottish text book. It emphasises the side of the subject which, though long an essential in England, has hitherto been lacking in Scots study. Though a bold departure, it is to be commended, for a proper knowledge of legal history is one of the things which teach the lawyer to handle his cases in a broad way. This aspect naturally owes a good deal to the production of the Stair Society's volume to which of course Professor Walker contributed. He is also one of those who take a strong view on the distinctive basis of Scots Law as an integrated system—as contrasted with those who are content to assume that it is much the same as English Law—maintaining that it is "radically different, has developed differently under the influence of different agencies and frequently arrives at results not dissimilar to those of English law but from very different premises and by a very different train of reasoning," a thesis which might well be produced also by comparative lawyers. Similarly, he warns his students against relying on English authorities and principles unless they are clear that there is a reason for doing so.

The picture of the judicial system in the next part, though necessarily mainly factual, is in a sense the core of what must be known to the lawyer. The author does not omit to set forth quite fully the courts and tribunals administrative and of special jurisdiction. Few lawyers could pass an examination on all those he enumerates. He shows his own broad-mindedness by including sections on the English courts and on those of Northern Ireland.

The author is far from leaving out of view that the lawyer is first and foremost a practitioner, and the last two chapters are devoted to legal proceedings and to legal method by which is meant principally looking up authorities. They contain summaries of procedure in the courts and practical hints on how to go about preparing a case, a good deal of which could not be absorbed from elsewhere or not so easily absorbed. No doubt Professor Walker's experience has largely contributed in deciding what to abstract in this regard as aid to the student at this stage and it would be presumptuous for a reviewer to know better.

An important part of such a book as this must be to direct the student who, as he should be, is stimulated to continue his research. For this purpose, lists of " Further Reading " following each chapter, as well as the footnotes on the text, provide ample material from which to select, for selection there must be.

It is of the essence of the matter that neither the course nor the book deals with the substantive law. It is with this background that the student goes on to his *Gloag and Henderson* and to classes in other subjects. It is an innovation and as such should be a successful textbook. It can be added that many lawyers will find it an interesting refresher course to remind them of much they have forgotten or not kept clear in their minds and a good deal particularly as regards history that was not taught them in their earlier day.

S. G. KERMACK.

Palmer's Company Law. Twentieth edition. By Clive M. Schmitthoff, LL.D., of Gray's Inn, Barrister-at-Law, Senior Lecturer in Law, The City of London College, and T. P. E. Curry, M.A., of the Middle Temple, Barrister-at-Law, Harmsworth Law Scholar; and, for Scotland, A. C. Bennett, Solicitor, and Andrew C. Bennett, B.L., Solicitor. 1959. London: Stevens & Sons, Ltd. Edinburgh: W. Green & Son, Ltd. £6 10s. net.

To review a work which has had an active lifetime of sixty years and is now in its twentieth edition would, in ordinary course, merely mean remarking on the way in which new material had been incorporated into the existing framework. This is not so here, for this edition has three features of outstanding interest which make it in effect a new book, to be examined and assessed as such. These features are, first, the complete rearrangement of the subject-matter;

secondly, the remarkable expansion of the subject-matter; and thirdly, the circumstance that it is the first major English textbook to be published in a Scottish edition. Considering these three features in order, the following observations occur.

The arrangement of the original work, published in 1898, set the pattern followed in all succeeding editions until 1959. This consisted of a succession of chapters, listed *seriatim* in the Table of Contents, without grouping or any other co-ordinating arrangement. The general scheme of development was discernible only to those who had already some knowledge of the subject. To the qualified lawyer, it was invaluable, but for others, and particularly for students, its vast learning was not readily accessible. This has now been remedied by dividing the subject-matter into ten parts, in each of which are grouped the chapters relating to a single general topic. The first part is introductory, describing the place of the company in the organisation of business, and the history of the Company Acts; the second part deals with formation; the next six parts cover activities, capital, membership, administration, reorganisation and winding up; the ninth part deals with special kinds of companies and other business organisations; and the tenth part contains three chapters on tax law. This scheme is simple, clear and self-explanatory, easily followed by even a beginner. It is no mere coincidence that the new arrangement of this work, which originated in a series of six lectures delivered by Sir Francis Palmer in 1897 in the Inner Temple Hall at the request of the Council of Legal Education, should, in the infinitely more complex world of today, have been devised by one who is himself a senior lecturer in law. Academic activities, often suspected by practical men, are often vindicated, in practical affairs, by resultant clarity of thought and orderliness of exposition!

The second feature is the remarkable expansion of the subject-matter. Here there are found not only the law contained in the Companies Acts and other legislation, and the decisions of the courts, but also particulars of the requirements of the Board of Trade, the Bank of England and the London Stock Exchange; secretarial and accountancy practice notes and recommendations; details of income tax and other taxes; and the recent developments of profit-sharing and pension schemes. Truly, the learned editors can fairly claim to have achieved their declared purposes to deal with the whole of the law as it is today, and to present it fully and completely. This encyclopaedic achievement was made possible by enlisting the services of a number of experts. The first nine editions were prepared by the author: the next ten by the late A. F. Topham with, at times, the assistance of A. M. R. Topham: the present edition is the work of a syndicate of specialists, no less than seven in number, a striking and somewhat alarming commentary on the rapidly increasing complexity of modern existence.

The third remarkable feature is that Scots company law, mentioned once in the first edition, and five times in the nineteenth, has now a whole section to itself. This section precedes the main text, and annotates it on points whereon Scots and English law differ. A similar step has only once been taken before, namely, in the latest edition of the popular textbook Topham's *Company Law*, to which Professor David M. Walker contributed a chapter on Companies in Scotland,

and this is the first major "technical" legal work in which it has been done. Here, too, the original design of Sir Francis Palmer—to produce "a practical book for lawyers and business men," for the company secretary and accountant, as well as the solicitor—has been followed, and this Scots supplement has been prepared by two Scots solicitors engaged in the daily practice of company law. Their annotations on the main text are followed by the relevant excerpts from the Rules of Court and the Bankruptcy (Scotland) Act, 1913, and tables of cases and statutes applicable in Scotland, and the entire preparation has manifestly been done in a very thorough and workmanlike manner.

This Scots supplement, like the Scots section of the indispensable *Current Law*, is printed on distinctive blue paper, and extends to more than one hundred and thirty pages; and the main work has been increased from eight hundred and thirty pages to some twelve hundred and fifty. But the use of fine paper, strong and durable, has ensured that the overall dimensions of the book remain the same as in the previous edition.

The present arrangement, segregating the Scots material in a separate section referable to the main text, is described as an expedient, as the decision to publish a separate Scottish edition was not taken until the main text was in page-proof. Whether this arrangement should be continued, or the Scottish material incorporated, by footnote or otherwise, in the main text, is for consideration. Company law has in the past sixty years become, as the learned editor points out, the law of business organisation and management in Great Britain: the book has for the past fifty years been increasingly used in Canada, Australia, New Zealand, India, the United States of America and elsewhere: and these countries have, as England has, extensive trade relations, and subsidiary companies, in Scotland. These considerations suggest the desirability of incorporating both legal systems in a single text; and this suggestion is confirmed by the circumstance that the important Scots case of *Carse* v. *Coppen*, 1951 S.C. 233, 1951 S.L.T. 145, of practical importance to all who have dealings with us, is, by reason of its being included in the main table of cases, omitted from the supplementary table.

One other suggestion: would the learned editors consider restoring to the next edition the collection of summaries of leading cases which was a feature of the first eighteen editions, but omitted from the last, and from this? As the learned author stated in his first preface, "The Acts alone afford a very inadequate view of the law . . . but the Acts plus the decisions constitute a great and, for the most part, admirable system of Company Law built up with the assistance at the Bar and on the Bench, and illuminated by the genius, of a host of great lawyers." And many who will use this book do not have ready access to a law library.

Sir Francis Palmer "laboured to make the work practically useful not only to lawyers and to students of law, but generally to business men": and the editors of this edition endeavoured to bring the work up to date "in the spirit expressed in that passage." This they have done. They have carried out a complete revision of the text, and rewritten several chapters, all in the non-technical narrative form employed by Sir Francis Palmer in his original lectures. But they have done more. By arranging the vast quantity of valuable material in a logical and clearly discernible system, they have made that material more readily accessible, and have facilitated the assimilation of the new developments which are even now pressing in upon us.

Congratulations are due also to the publishers, Stevens & Sons, Ltd., London, whose care the work has been since its inception in 1898—a long record!—and to Dr. George R. Thomson, of W. Green & Son, Ltd., Edinburgh, whose vision and drive through the years to ensure that "the lieges be servit of the law" place the entire legal profession in Scotland increasingly in his debt.

David Maxwell.

Judge and Jurist in the Reign of Queen Victoria. By C. H. S. Fifoot, M.A., F.B.A., Barrister-at-Law, Reader in Common Law to the Council of Legal Education. The Hamlyn Trust. 1959. London: Stevens & Sons, Ltd. 15s. net.

In a further course of interesting and instructive lectures, now put into book form, the Hamlyn Trust are admirably continuing their object of furthering the knowledge of English law. Though the emphasis of the lectures is upon English law, they are nonetheless of wide appeal, and the Scots lawyer will find in the volume much of importance and interest to him.

The learned author first examines the methods and results of judges and jurists in the era of Queen Victoria—1837 to 1901. The social and economic background of a great epoch is sketched as a basis for a powerful description of the many very learned judges and jurists who contributed to the administration and development of the law during those sixty-four years. "Upon the crowded years of her reign no single pattern may be imposed." English law was much influenced by the biological, philosophical and theological trends of thought of the day. "Ethical preoccupations coloured the approach to civil and criminal liability." On the other hand, only in the last quarter of the nineteenth century was the study of legal history seriously undertaken, despite the increasing general interest in history, and here one has the names of Willes, Maine, Pollock and Maitland, and the foundation of the Selden Society in 1887. Law, being made by men, should, says the lecturer, be studied through biography, and in that light he thinks the judicial history of this era should be divided into three periods. In the first period to 1852 the stage is held by Baron Parke, the "absolute ideal of a judge" in Lord Dunedin's words. The second epoch from 1852 to 1875 has three great figures—Lord Bramwell, Lord Blackburn, learned scholar and writer as well as judge, and Willes J., whose judgments "are seen to be masterpieces"—while in the lecturer's view a Scotsman just missed being included in that category—Lord Campbell. The last twenty-six years are dominated by three more illustrious and erudite lawyers, Lords Lindley and Bowen, both great jurists and judges, and Lord Macnaghten, who had the "gifts of listening with patience and deciding without doubt."

Not one of these very great lawyers had any legal education. For one thing there was "none to have"; a man "ate his way to the

Bar." Mr. Fifoot then proceeds to show the evolution of legal education after 1852, the development of academic instruction. As he points out, it was only in the nineteenth century that future judges were "bred upon Anson and Pollock" and of these the first and greatest was Lord Justice Scrutton.

The second chapter deals with the principles of civil liability, which were first determined in this era and the need for which, in relation to negligence, was first shown by the rapid advance of the means of communication. There follows the interesting story of *Heaven* v. *Pender* and *Indermaur* v. *Dames*, the cataloguing of duties, the emergence of the duty to insure, extending beyond fault as laid down in *Rylands* v. *Fletcher*, where, however, Mr. Fifoot says Blackburn J. did not consider that he was laying down a dual standard of liability but unfortunately obscured his true meaning by the famous phrase "things likely to do mischief if they escape," in a formula that had in itself "the seeds of controversy" and still spells "riddles that await answers." Then the learned author turns to vicarious liability of the master for his servant, pointing out that this is an example of responsibility without fault—though no attempt was made in *Rylands* to equate that case with this doctrine—and that the rise and development of the doctrine was due to the industrial revolution. Once again Willes and Blackburn JJ. were the leaders, but they did not seek to include the principle in a concept of strict obligation. By the end of the century the forms of action had been succeeded by a miscellany of torts. Next we are given an account of the work in this field of Markby and Holmes, the latter of whom had great influence on the English common law; and lastly, an account of Pollock's great Treatise on *Torts*. The jurists were no more successful than the judges, says Mr. Fifoot, in generalising civil liability, and indeed he thinks "it requires an act of faith to postulate (a) principle or to indicate the goal to which they were tending."

The third chapter gives us the legal story of the joint stock company—of which the material was also provided through the new means of communication—and the fitting of a corporation into the common law, the rejection of the fictitious personality theory, the development of contractual capacity, civil and vicarious liability and the extent of the authority of a corporation's officials.

Passing to the doctrines of Possession in the next chapter, Mr. Fifoot discusses the place of Savigny in the first half of the epoch and the rejection of his views in the second, the famous work of Pollock and Wright, the element of control and whether *Bridges* v. *Hawksworth* was wrongly decided, saying that, if it was, the error was one of fact only. The chapter concludes with an essay on possession under the criminal law. Mr. Fifoot's conclusion is that up to 1901 "neither judge nor jurist had succeeded in constructing a doctrine that was at once coherent and realistic," and that they regarded possession differently according to whether civil or criminal liability was involved. But possession, he agrees, can have different meanings.

Finally, the subject of the development of the criminal law is considered, and this, it is hardly necessary to state, involves the story of the great Sir James Fitz-James Stephen, who simplified the English criminal law on the basis of contemporary standards of morality or wickedness, as a branch of social justice. From this stemmed the careful delimitation of crime and tort by the courts. The learned author passes on to consider the place of *mens rea*, and thence to the interpretation of statutes, with the three great rules which the judges laid down in the first half of the nineteenth century. If, he says aptly, the criminal law of those days seems to the modern lawyer to have lacked completeness, it was sufficient for the ordinary citizen, who " sought neither the fraternal discipline of the police state nor the *diablerie* of the psychiatrist."

In a concluding chapter Mr. Fifoot reminds us of the difference of approach, which the book shows, of judge and jurist, and emphasises the help which the former, fettered by the need for caution, by the decision on the particular case before him and by precedent, can get from the academic lawyer. The jurists were, however, of too late a date to affect Victoria's judges.

The book is a fascinating and valuable account of great men and a great epoch; they may possibly never be equalled. They served their day and generation—and future days and generations—in a way that must ever command admiration and respect, whether or not their theories and views are acceptable in later times.

The volume is well printed and has a useful index.

G. C. H. P.

Judicial Review of Administrative Action. By S. A. de Smith, M.A., PH.D. 1959. London: Stevens & Sons, Ltd. pp. 455, 31 (Appendices and Index and XLVII Table). £3 10s. net.

There can be no doubt about the need for such a book as this. The subject-matter is everywhere of growing importance, and in England the need for such a book was growing almost faster than elsewhere. It is almost true to say that, while the number of cases grew by arithmetical progression, the difficulty of discerning principles grew by geometrical progression. Shades of differentiation arise in perplexing variety; what is " judicial " may depend not so much upon the nature of the action challenged as upon the object or means of the challenge. Each small compartment of the law, such as liquor licensing cases or rent tribunal cases, has tended to develop in isolation from other compartments, even though the essential problems might be similar. So prevalent is this fragmentation that at one stage the author, after reviewing certain authorities, is compelled to conclude: " it may well be that the criteria [upon which the scope of review will be judged] will vary with the nature of the subject-matter and the court's assessment of the measure of deference that ought to be accorded to a particular tribunal's expertise." In modern times this administrative law equivalent of the " length of a Chancellor's foot " is scarcely satisfactory. With a jungle of cases behind and the prospect of jungle still ahead a survey such as this is both necessary and difficult to accomplish.

For the most part the discussion centres round the prerogative orders though the use of injunctions and declarations, etc., is also fully covered. It is, then, the review of administrative adjudication which occupies the greater part of the book. Nevertheless those remedies themselves go somewhat further afield than that particular subject-matter and, apart from them, more general questions of the judicial review of administrative action are raised and discussed. Questions of *ultra vires*, of the ouster of the jurisdiction of the courts, of the effect of default powers of Ministers, are thus dealt with. Relative to the scope of other parts of the book, these portions are not so detailed or comprehensive, nor (again by comparison) do they contain much that is new. This is perhaps a reflection of the methods of control. The dominant place of the prerogative orders continually drives the discussion towards quasi-judicial decisions of one form and another with an elaboration of the principles of natural justice or of the *audi alteram partem* rule. The shape of the law governs the shape of the book.

The traditional remedies in English administrative law are dealt with both in their modern form and historically, and from both aspects the gathering and discussion of material are valuable; and if the conclusions reached are, at times, like the one quoted, the fault lies only with the law. Indeed the historical portions are of particular value. Reasons for the present shape of the law tend to be assumed rather than sought out, and the assumed reason is not always true. The arguments about " speaking orders " are a good example of this process and the present book will do much to prevent misconceptions; there is in it a wealth of reference to authority and to literature to buttress argument and to serve as the starting point for further exploration. The material gains in value since all the remedies are dealt with in the same way, and by comparison principles become clearer and apparent inconsistencies become at least comprehensible. The volume of citation is a mark of the difficulty of such a view and to bring such order out of the chaos of material is an achievement.

It is the more general issues of judicial review which will have greater interest in Scotland. Even if particular methods of control vary, a general pattern tends to be established throughout the Kingdom. There is here much to be studied. The effect of ministerial powers of control upon those exercisable by the courts, the circumstances in which administrative controls are more appropriate than judicial ones, are problems which have only become of great importance in this century, and are typical of the other matters here discussed. The discussion is not, as has been suggested, so detailed as on the other side. To take one example, while the administrative and other appeals under the Private Street Works Act, 1892, are mentioned, the complex appeal procedures under the other related Acts are not; though a discussion of the whole, stretched from 1875 to 1951 might suggest a pattern. Similarly a more detailed discussion of all the stages of the continuing litigation between the *British Oxygen Company* and the *South of Scotland Electricity Board* might have been valuable in a larger field of principle. These are obvious difficulties of keeping the size of the book within reasonable compass, and it is perhaps easier to ascertain the law in this field than in the other; thus the concentration upon the more difficult area is justifiable in intent and in result. Nevertheless there are passages related to such topics where one would have welcomed the closeness of argument which elsewhere marks the book. At times analogies are drawn which are not entirely satisfactory. Thus the discussion of agency and obligation of powers seems to rely upon some of the rules of the ordinary private law of agency which are not necessarily applicable, and more general propositions are laid down than are thought to be always justified by the authorities, for here again the process of segmentation has been operative, and there can be much argument about the weight to be given to particular authorities outside their own context.

The breadth of the book, in a different way from subject-matter, should be emphasised. The problems of judicial review arise in any complex society, and the book is stimulating in referring to experience elsewhere, notably to experience in the Commonwealth and in the U.S.A., particularly so since insularity has perhaps been one of the causes of weakness in this branch of law. Such citations are, then, welcome but must be treated with caution, being useful as stimulating ideas rather than as direct authority. Solutions of the problems of administrative law are much governed by local conditions and governmental arrangements and ideas. Thus the weight of alien decisions may be weakened. This is particularly true in Chapter II in relation to the definition of terms such as " judicial " where, for example, the shape of the Australian constitution is important; but it is also true elsewhere in the book. Thus, Continental substantive law in connection with *détournement de pouvoir* is strongly influenced by procedural rules which do not, and perhaps cannot, exist here. While therefore the references are welcome and stimulating, the reader must be careful to construe them in the light of a background which is often significantly different. This is even true when the experience is no further afield from England than Scotland (in some of those cases the references to the fuller reports in either of the Scottish series might have been given). Again it is obvious that these non-English references are not so complete as are the English ones, nor are all the contrasts drawn with Scotland. That cannot be a point of criticism but it must be mentioned, for in so detailed a book an omission might be taken by some readers to indicate an absence of authority. This emphasis on the need to consider background is again merely a matter of warning, and it is equally, though in a different way, applicable to English cases. *Prescott* v. *Birmingham Corporation* [1955] Ch. 210 is only explicable in terms of a very modern attitude to local government authorities; it is almost inexplicable against a nineteenth-century background. In itself it is a very arguable decision and not all would give it the weight, which is here given, against for example dicta in *Att.-Gen.* v. *Leicester Corporation* [1943] Ch. 86.

This problem of the relationship of cases to times is very serious over the whole subject-matter of the book, and gives added value to the careful historical passages. Now perhaps the speed of change is greater. Many circumstances combined to alter the climate of opinion between *Duncan* v. *Cammell, Laird & Co.* [1942] A.C. 624 and *Glasgow Corporation* v. *Central Land Board*, 1956 S.C. (H.L.) 1; 1956 S.L.T. 41, and upon such shifts of opinion much depends in this field of judicial review. The basic questions of the proper place and scope of judicial review can be only partially answered by the process of balancing authorities. There is apparent, in the story told here, something of a decline in the rule of the courts, or perhaps a self-imposed moderation. That moderation or retirement has left gaps in the legal system which the expansion of Parliament has not adequately or sufficiently filled. These major issues are not really directly touched upon in the present book. Perhaps they could, or should, not be in a book of law, and yet they lie at the heart of the matter. We concern ourselves with the reform of this institution or that, with producing a Tribunals and Inquiries Act or similar legislation, but we do not examine major institutions against the whole background of the constitution. That examination is often difficult because formalism and procedure conceal the real issues. To clear away these preliminary difficulties is essential and, even if some of the major issues are only touched upon obliquely in this book, that necessary and difficult preliminary work is here done. That alone is an achievement. This orderly, well written, and argumentative book is an important aid to the study of English administrative law. There will be few who will not profit from it, and the careful reader will be left much food for thought, and correspondingly all the more grateful if he likes that diet.

J. D. B. MITCHELL.

Bowstead on Agency. Twelfth edition. By E. J. Griew, M.A., LL.B., of Gray's Inn, Barrister-at-Law. The Common Law Library, No. 7. 1959. London: Sweet & Maxwell, Ltd. Price £3 10s. net.

"This book has now passed its golden jubilee." So writes the learned editor of this latest edition: and it is interesting to note, by comparison with the first edition of 1896, how truly this is in form and style, the same book, kept so of set purpose by successive editors whose aim throughout the years appears to have been the same and who have, to quote again the present preface, "retained so far as possible the language, arrangement and content of the text . . . to the end that the book should remain as nearly the same book as possible." But if the form remains the same, the development of the law in the past eight years has occasioned numerous though unobtrusive alterations in the subject-matter. Four articles and numerous cases have been deleted; six articles have been rewritten; and much new material, including one hundred and seventy-five cases, has been introduced. This remarkable continuity may possibly be due to the circumstance that this branch of the law is almost entirely regulated by common law and contacts with other common law systems, and is not subject to the variable complexities of regulative statute. Even the publishers have remained throughout the same, a comforting thought in a world of much disturbing change!

Scots reviewers have a not unnatural interest in Scots law, and are sometimes influenced in their assessments by the justice or injustice done to their native system. Here, the only injustice discovered —if it be an injustice—is that Scots cases decided in the House of Lords are cited by reference to the English law reports only; and one might venture the request that references to *Session Cases* and *The Scots Law Times* be hereafter included, as this work has long been used by Scots students and practitioners.

A perusal of successive editions prompts two or three thoughts of general import. Recent editors claim to have been primarily guided by, and to have catered for, the needs of practitioners, and the learned editor of this edition comments that the consequent retention of familiar identity " may not be a matter of entire satisfaction to the academic lawyer." But law and life are inseparable, and those who write for practical men should keep in view also the students who will one day also be " practical men " and will use in practice the textbooks with which they have become familiar in academic days. Are not Story's *Commentaries on the Law of Agency* " mainly designed for the elementary instruction of students "? And do not Hanbury's *Principles* " contain the essence of lectures delivered in Oxford University to law students "? William Bowstead himself was, in his early years at least, an academic lawyer who wrote both for students and for practitioners, his original purpose being thus expressed: " My object in writing this Digest has been to reduce the English Law of Agency to a concise statement of definite rules and principles, illustrated by decided cases. While I have thus attempted by the form of the Work to facilitate the study of the law, I have at the same time endeavoured, by referring to practically all the reported cases bearing on the subject, to render the Work useful to practitioners for purposes of reference." This is, it is submitted, an ideal for any textbook—to provide for students a clear exposition of general principles, and for practitioners a starting point for the detailed research necessitated by particular problems.

The second thought which occurs is that today a knowledge of law is required of many who do not require to be " men (or women) of law "—particularly those engaged in business and administration as accountants, secretaries and executives. These have, in their intensive training, no time for those jurisprudential studies which are a necessary part of the discipline of the lawyer; but they require to be familiar with the law as a series of concise practical propositions, readily ascertainable, for application in the rapidly evolving situations of business life. And for academic training along these lines, textbooks such as *Bowstead* are peculiarly well suited.

The last thought—mentioned for our encouragement—is of the international nature of law, so discernible in Agency, and of the ultimate significance and value of a system designed to realise the highest conceptions of practical justice. These have been well expressed by the American jurist Story, and I cannot, in a review consisting largely of quotations, do better than quote his own words. After paying tribute, in the introduction to his classic work, to the jurists of other lands and other times who built up the law merchant and the law maritime, he continues: " Still, however, it will scarcely be denied that the judgments of the Courts of Common Law, upon the great topics of Commercial and Maritime Jurisprudence since the elevation of Lord Mansfield to the Bench "—he was a Scotsman !—" place them in advance of all others for practical wisdom, profound reasoning, acute discrimination, and comprehensive equity ": and he concludes the work with these words: " It is indeed to be numbered among the proudest achievements of England, that, while the peculiar doctrines of her own common law have been cultivated and illustrated by her lawyers, and administered by her judges, with a sagacity and learning and ability rarely equalled and never excelled, Westminster Hall has promulgated the more enlarged and liberal principles of her commercial jurisprudence with a practical wisdom and enlightened policy which have commanded the respect of the world, and silently obtained for it an authority and influence more enviable and more extensive even than those acquired by her arts or her arms."

DAVID MAXWELL.

Edward I and Criminal Law. By T. F. T. Plucknett, F.B.A., Professor of Legal History in the University of London. 1960. Cambridge: The University Press. Price 16s. net.

The contents of this slim volume represent four lectures delivered by Professor Plucknett in 1958 at Queen's University, Belfast, in the series of Wiles Lectures on the History of Civilisation. It appears from the preface that the audience at the lectures consisted of distinguished historians and lawyers not only from Belfast, but also from Eire, England and France, and that subsequent discussion among them contributed to the final form in which the lectures are published.

The title under which the lectures have appeared does not entirely reflect what the author has achieved. From the safe distance of today Professor Plucknett has looked back on some aspects of the development of criminal law in England between the time of Ethelbert of Kent and the end of the thirteenth century, having in mind the effect which such developments may have had on modern English criminal law.

The inability of the primitive laws of Anglo-Saxon times to draw any distinction between civil and criminal wrong is of special interest at a time when the pendulum seems to be on the way back and discussion is being stimulated with regard to the state assuming responsibility for making restitution to those injured through criminal acts involving physical damage. The conception of crime, criminals and of the state as a protector of the individual was still a long way off when legislation was enacted in the sixth century which prescribed a tariff of the amounts payable by the injurer to the injured for acts which were later classified as criminal. Despite categorical statements about the absence of even the faintest trace of Roman influence (outside the ecclesiastical sphere) on Anglo-Saxon laws, the tariff method included in the earliest surviving laws of King Ethelbert irresistibly reminds us of the fixed penalties for broken bones and other injuries which appeared in the XII Tables.

Although in early Anglo-Saxon times the state or any central governing body was too ill-defined and weak to enforce an organised form of criminal law, private justice gradually gave way to a form of control over the law breaker through agencies of local government, and the Crown's prerogative, manifest to begin with by exacting fines from an offender in addition to any restitution he was required to make to the injured person, emerged. Professor Plucknett draws the threads of this and other developments (such as the positive responsibility which the Crown had to assume for criminal prosecutions when the decree of the Lateran Council in 1215 resulted in the replacement of the ordeal by the equally inscrutable and, on some occasions, irrational jury) through his lectures and indicates clearly and in a philosophical manner the important factors between the sixth and the thirteenth centuries which contributed to the fabrication of a system of criminal law and its enforcement. Finally the author suggests how Edward I—the English Justinian—through his legislation made a whole cloth out of the threads available to him. The twelfth century decided that English criminal law should be uniform and royal and the legislative Acts of Edward I confirmed this by the procedural details and specification of penalties which they contained.

Many of the simple and antiquated provisions of the early laws which we are enabled to glimpse in these lectures give rise to stimulating thoughts about some accepted features of current criminal law and theories of punishment. To instance two examples. First, the provision in laws enacted in the sixth century, that liability may attach to a weapon which had become involved in an unlawful enterprise (which developed into the owner of a weapon which did harm when in the hand of another having to clear himself of any complicity), encourages speculation as to the paternity of common intention and accession. Secondly, it is of interest to learn that there was concern in Anglo-Saxon times about the indiscriminate use of the death penalty: especially when Ethelred's pronouncement that "God's handiwork which he redeemed at so great a price ought not to be destroyed for trivial offences" is followed by the author's statement that "This feeling bore fruit in the next reign when William the Conquerer completely abolished the death penalty, substituting the even more savage, and generally fatal, penalty of mutilation."

A backward glance at the gropings by the men of that age towards fundamental principles of criminal justice may help to disperse some of the obscurities in that branch of our law which over-refining modern thought tends to create.

J. V. M. S.

Guide to Foreign Legal Materials: French—German—Swiss. By Charles Szladits, LL.M.(Lond.), DR.JUR.(Budapest). 1959. New York: Oceana Publications Inc., for Parker School of Foreign and Comparative Law, Columbia University. 95s. net.

The legal profession is already indebted to Dr. Szladits for his excellent *Bibliography of Articles in English and Foreign and Comparative Law.** It is placed still further in his debt with the publication of the present guide to French, German and Swiss legal materials. This is a book which is likely to exhaust the superlatives of reviewers for it is both an incomparable aid to research for the student of comparative law and an extremely useful tool for any lawyer who requires a convenient guide to modern Continental thought on his subject.

Dealing in turn with each system the author first discusses its sources of law and then its repositories. In discussing the sources he outlines briefly the constitutional bases of the legal system and the organisation of the courts. Dr. Szladits has taken some account of the far-reaching changes in France consequent upon *la réforme*

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* New York: Oceana Publications, Inc., 1955.

judiciaire, but he refrains from any premature evaluation of its effects. His examination of the weight to be attached to the various sources of law, formal and material, though necessarily brief, is quite profound: for example, his discussion of the interrelation of enacted law and case law in Germany is an invaluable appraisal of the process of judicial law-creation in a codified system. In describing the repositories of the law, Dr. Szladits first lists and analyses the general bibliographies on the legal system. He then describes legislative materials including codes, statutes and decrees, but not in the manner of a mere bibliographical compilation: it is rather a helpful critical introduction to these materials. The author refers to the more important collections of statutes, official and unofficial, and the major commentaries upon them. In some cases he reproduces the text of the official gazette or unofficial commentary to illustrate its form. A similar technique is applied to case law. The official and unofficial repertories of decisions are described and discussed, texts are reproduced, methods of citation are explained, and an outline is given of the form of judgments and the manner in which these are reported. Reference is also made to legal digests and other compilations of case law. Legal textbooks are classified according to subject-matter: introductory works, treatises on private law in its various categories, works on commercial law, industrial law, and so on. The literature even upon such recondite subjects as legal history and jurisprudence is described and evaluated. The reader is introduced to the more important legal periodicals, and the ubiquitous *Festschriften* are not neglected.

This is a scholarly work which should be possessed by every serious student of the law and of legal institutions.

A. E. ANTON.

Law in a Changing Society. By W. Friedmann, Professor of Law and Director of International Legal Research, Columbia University. 1959. London: Stevens & Sons, Ltd. £2 10s. net.

Nine years ago in *Law and Social Change in Contemporary Britain* Professor Friedmann presented a fascinating and enlightening picture of the changes taking place in a legal order developing under the impact of rapid and very substantial changes occurring in the framework of society. The pace of change has now somewhat slackened, though the contrast with pre-war society is still very striking, and the changes of the war and post-war years have to a great extent been assimilated. But their effects on law are still difficult enough to discover and evaluate, and few jurists have the broad experience or impressive scope of knowledge of Professor Friedmann to enable them to assess the trends. Here is jurisprudence, the standing back and critical surveying of law from a detached standpoint, at its least technical and most fascinating.

This new book deals with broadly the same theme as *Law and Social Change* but is much more than a revised version or reissue of that book. Six of its chapters are based on corresponding chapters of the earlier book, though brought up to date and very largely rewritten. The remaining ten are new, and deal with such themes as Family Law, Criminal Law, Freedom of Trade, and Corporate Power, the Law and the State. The whole is based on such wide knowledge of law and its working in society, of so many different legal systems, and reveals such powers of perception and analysis, as few can pretend to. It covers the whole sweep of legal relations and the whole ambit of law as a controlling factor in society, public law, private law and international law, so that every specialist can find something of interest about his own specialty and also see a spotlight turned on the salient developments in other fields. The theme is that society, national and international, has been changing rapidly and is still changing, and that law is evolving and developing, as it must, to take account of new problems and circumstances. It is of the greatest value to lawyers of more limited experience, or whose ability to see the wood is hindered by the everyday necessity of working with particular trees, to read this panoramic survey.

The book also points clearly to the sterility of the traditional legal education and the need to show the student of law the social, economic, political and other needs which the law is serving, the inarticulate premisses underlying the rules, and to the paramount need to make law conform to the needs of the time and the views of the community, to work out new legal protections against new dangers, instead of relying on old principles, worked out in different conditions and possibly now quite unsuitable and impotent.

Not all Professor Friedmann's conclusions can be accepted in their entirety. Thus, is it really true that "In those fields of tort which are socially most significant—traffic accidents, industrial accidents, responsibilities of employers, manufacturers and other controllers of properties and enterprises—the fault principle has either been superseded by strict liability or has lost its moral significance and become barely distinguishable from so-called strict liability"? The tendency is certainly towards strict liability, but have we really gone so far as Professor Friedmann alleges? In this and some other cases the conclusions he reaches may go further than all would be prepared to accept.

This is undoubtedly a book of the first importance and of compelling interest which deserves to be widely read, pondered and considered and to find a wide circle of appreciative readers.

David M. Walker.

Natural Justice. By H. H. Marshall, C.M.G., LL.B., Q.C., Barrister-at-Law, Attorney-General for the Northern Region of Nigeria. 1959. London: Sweet & Maxwell, Ltd. £1 15s. net.

The title *Natural Justice* is likely to mislead for this book is no more than an analysis of two principles of law. The first is that no man shall be judge in his own cause and the second that both sides must be heard. The author deals with the various manifestations of these principles in statute and case law and with their application to the decisions of domestic tribunals, foreign courts, arbitrators and officials in the exercise of statutory powers. These matters are discussed comprehensively and lucidly, but the reader is left with the impression that there is little justification for a book dealing merely with two rules of law, especially when its author virtually confines himself to considering their application within one legal system.

A. E. A.

Joseph Story: A collection of writings by and about an eminent American Jurist. Selected and edited by Mortimer D. Schwartz and John C. Hogan. 1959. New York: Oceana Publications, Inc. U.S. $5.

To few is it given to attain greatness as a teacher of law, as a writer of legal treatises, and also as a judge of his country's supreme court. Yet such was the achievement of Joseph Story, who would certainly be named in any selection of the half-dozen or so greatest American jurists, and it is very surprising indeed to learn from the preface to this book that there is in existence no satisfactory biography of him. He belonged to the great generation of Americans who succeeded the Founding Fathers and had to consolidate and develop and interpret their work. Story was born in 1779, the grandson of one of those who, garbed as Indians, threw tea into Boston harbour in that famous exploit of defiance; he was called to the Massachusetts Bar in 1801, became Speaker of the House of Representatives of Massachusetts in 1811 and served as an Associate Justice of the United States Supreme Court from 1811 to 1845 under the successive Chief Justiceships of John Marshall and Roger B. Taney. From 1829 to 1845 he was also the first occupant of the Dane Professorship of Law at Harvard and helped materially to build up that Law School. It was in pursuance of the extensive duties at that Chair that he not merely lectured on a broad field of law but wrote those many erudite volumes of *Commentaries* on various branches of the law, in many cases the first in America, in some the first in the English language, all highly regarded in their day, and some, especially that on conflict of laws, still frequently cited with respect. Stated thus baldly his career is of no mean achievement.

In default of a full-length biography the editors of this book have built up an interesting short sketch of the man and his work from extracts from his own autobiographical letter to his son, from his correspondence, judicial opinions and addresses, and from assessments and evaluations of him culled from many sources. These illustrate the breadth of his scholarship, his influence as a jurist, and his work as a judge. Particularly interesting are the revelations of his scholarly relations with Mittermaier, Lieber and others, to which might have been added George Joseph Bell (see 1959 J.R. 31), and the recurring theme of his interest in civil and comparative law as a means to the full appreciation and criticism of the Anglo-American law. Lesser facets of his career, such as his poetical expertise, are also discussed and exemplified.

There are unfortunately many misprints in the Latin maxims and phrases quoted. There is, however, a useful bibliography to enable one to follow up further details of the career of this jurist, who surely deserves a satisfactory memoir. For it is abundantly apparent from the passages skilfully arranged and collected here that Story was a man of quite outstanding qualities and one who exercised by his judgments and books a permanent influence on the law of his country and even on the whole Anglo-American system. The great value of this brief book is to indicate clearly that here was undoubtedly a great jurist, and to whet the appetite for a definitive study of him.

David M. Walker.

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JURIDICAL REVIEW

QUESTIONS FOR OUR TIME

IF there were to be assembled the great legal scholars from all parts of the earth,[1] not as representatives of states or governments, but as men distinguished for knowledge and wisdom, and if there were time for full discussion and no necessity for formal resolutions at the conference end, what problems might they find common to all mankind in these times? One of the questions out of so many which might well concern them, is: where does power reside and where ought it to reside in a community of men or states?

The realisation has come that in a divided world critical problems arise suddenly and demand immediate action, and that on such occasions the dictatorship, with power concentrated and unrestrained, can act quickly and without advance warning, while power, exercised through representative assemblies, may be both slow of foot and as apparent as life in a gold-fish bowl. The question is not new, but what is new is the increased tempo at which such problems are now presented for quick decision. Not unexpectedly in an era which thinks in terms of mechanics, the responses of the representative governments to this challenge have taken the form of proposals for speeding up action, " stream-lining " as it is often called. Much of the discussion in the United States over the so-called Bricker amendment to curtail presidential power arose from the fear that too much power had been placed by the Constitution in the President to take action without consulting all in times when emergencies were more than occasionally proclaimed and crises arose frequently.[2] Discussions of the necessity for quick retaliation against an atomic attack usually weigh on the one hand the efficiency of a concentration of authority, against the danger of placing the power of decision in the hands of a few. We fear not the quick decision, provided it be the right decision.

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[1] These remarks were written in 1958, long before a " summit " conference was planned.

Here then is a problem worthy of the attention of our community of scholars. Let them re-examine the need for the concentration of power and responsibility in this age and let them study the safeguards whereby quickness of action may be accomplished without sacrificing the rights and protection of the individual. But any debate on this question of the hands into which power is to be placed, leads quickly to the more important question upon which it depends: to what ends shall this power be exercised in this modern world of missiles and mock moons? [3]

It is now some fifteen years since World War II ended, since that period of soul-searching about this problem both in the councils of the statesmen and in the trenches and fox-holes. We can trace the shape of the world which was to come after the War in the declaration of Mr. Churchill and Mr. Roosevelt, known as the Atlantic Charter of the Four Freedoms,[4] in the Declaration on Security reached at Moscow,[5] in the statements at Yalta,[6] in the Proposals at Dumbarton Oaks, in the Charter of the United Nations and in the Declaration of Human Rights. These were the declarations of the world community on the ends and aims to which the governments of the world would strive. It was important and significant that these avowals be made, that they be set down as the goals toward which the new order must strive, even if some of them have been honoured only in the breach. It is also important that they be stated frankly as " aims " and not as " realised ideals " or " binding obligations." [7]

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[2] Fenwick, "Proposed Limitations Upon Executive Agreements," 47 A.J.I.L. 284 (1953); A. E. Sutherland, "Bricker Amendment, Executive Agreements and Imported Potatoes," 67 Harv.L.Rev. 281 (1953); D. R. Richberg, "Bricker Amendment and the Treaty Power," 39 Va.L.Rev. 753 (1953).

[3] Mr. Peter M. Campbell wrote to *The Times* on August 18, 1958, saying that "We may presume that the enormous sums of money spent on efforts to encircle the moon are justified on grounds of national prestige. How much greater should be the prestige of the nation that aimed at the virtual abolition of malaria throughout the world. One can but wonder if man has not got his priorities a bit out of order." But the *Manchester Guardian* of August 18, 1958, explains the race of the Soviet Union and the United States to the moon as "a weird quest which is born of economic exuberance and is mainly justified by the belief that the simplest way of finding out about space is to go there and look."

[4] "They believe that all of the nations of the world, for realistic as well as spiritual reasons must come to the abandonment of the use of force." Declaration of Principles known as the Atlantic Charter by the President of the United States and the Prime Minister of the United Kingdom, August 15, 1941.

These declarations, in the sweep of history, will represent the diagnosis of this age of its ills and its mission. The charge that they represent a materialistic philosophy and notion of man's destiny, and assume that man's ills can be cured primarily by the provision of more food, shelter, clothing and medical care, is not entirely fair, since other parts of the United Nations Charter proclaim that this desired climate of security and well-being is important not as an end in itself, but as a prelude to the realisation of the dignity of man as an individual person. The wonder is not that the Charter is in large part materialistic in philosophy and outlook: the wonder is that in this age of materialism men could look forward to the hope and abundance of man's free spirit.

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[5] " . . . recognizing the necessity of ensuring a rapid and orderly transition from war to peace and of establishing and maintaining international peace and security with the least diversion of the world's human and economic resources for armaments." From the Declaration of Four Nations on General Security, Moscow, October 30, 1943.

[6] " We are resolved upon the earliest possible establishment with our allies of a general international organization to maintain peace and security. We believe that it is essential, both to prevent aggression and to remove the political, economic and social causes of war through the close and continuing collaboration of all peace-loving peoples." From the Report of the Crimea Conference, February 11, 1945. U.S. Dept. of State Bulletin, vol. XII at p. 213.

[7] Thus Goodrich and Hambro, in commenting upon the " legal force " of the Preamble to the Charter of the United Nations say that " . . . the Preamble has significance as a statement of the basic motivating ideas of the Charter and of the purposes which its framers had in view." Goodrich and Hambro, *Charter of the United Nations, Commentary and Documents*, p. 5 (1946). In the case of *Sei Fujii* v. *State of California*, 242 Pac. (2d) 617 (1952) in which the court was asked to consider the effect of the preamble of the Charter and article I on the law of the United States, Gibson C.J. wrote: " They state general purposes and objectives of the United Nations Organization and do not purport to impose legal obligations on the individual member nations or to create rights in private persons."

Following the war, and in these days of cold war and peripatetic crisis, when new nations have seemed at times more interested in proclaiming their rights than in assuming their full duties of membership in the world community, when decisions have often had to be taken quickly without the " luxury " of reflection, debate and counsel, as has been the case in the matters of Korea, Suez, Jordan and Lebanon, we have become increasingly aware of the one who decides. How does he make up his mind? Whom does he consult? What does he believe? What ought a man to have in mind when he approaches a decision? Thus every word, however trivial, of an American president, or Soviet premier, is scanned, dissected and weighed for indications of the path to decision. Fear that some demented person might release the hydrogen bomb; fear that the head of some country is not being kept advised of all the events transpiring in the world; fear that some ally will act without consulting other allies; fear that decisions will be reached upon erroneous or incomplete advice as to the facts; these fears and many others have made us realise how little we know about the process of decision.[8]

The search for infallibility in decision or the wise plan of action has led such eminent Churchmen as the retiring Bishop of Chichester and the Archbishop of Canterbury to " urge the nation to submit at least its economic problems to the guidance of a committee of seven wise men " [9] and in the United States it has led to the establishment of numberless committees and boards of experts to advise the President upon such matters as security and economic policy. The search for the super-expert is on. As *The Times* editorial went on to remark, the problem in England is " to unite wisdom with the ability to effect political change by the processes of consent. Increasingly, in the twentieth century it has been assumed that government must be conducted on a hand-to-mouth basis. It is from this that the fatal gulf between intellectuals and men of action arises; the consequence of that gulf is that intellectuals become Utopians and statesmen degenerate into politicians."

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[8] Apparently not a new concern: " At the present hour the destiny of Europe during many years depends on the will of one man, and may be decided by his state of mental or bodily health or by his humour at any given moment. So must it always be as long as vast standing armies destroy the action of public opinion, and place the fate of mankind in the hands of a single potentate or courtier." Editorial entitled " The Cold War " in *The Times* of February 26, 1859.

[9] Referred to in the editorial in *The Times* of December 9, 1957, entitled " Wisdom and Power."

The question of decision brings us to yet another problem which representative governments must meet, namely, whom shall the representatives represent? To what extent has the old idea that the function of the representative is to present the interests of a certain number of remote citizens been superseded by the notion of loyalty to party control or service to the public good of the whole nation? To what extent has the concept of locality representation been rendered obsolete by the fact that television, radio and the Press now bring each citizen into the arena of action, or by the fact that the opinion poll and questionnaire have made the " average " citizen's opinions available to all? If such be true, then should the representatives be chosen for their wisdom, political acumen, economic power, number of constituents, or *expertise* in the art of governing? Do we require all or none of these things? Are we afraid of the man who is an expert, and do we want the " common man " as our representative? Those who formed the United Nations gave much thought to this question of representation: should it be responsive to numbers, power or equality? The Security Council more closely resembles models of company law than those of parliaments while the International Labour Organisation and the Economic and Social Council have experimented with quite new methods of representation.

Tied into these questions of representation and exercise of power is that of the responsibility owed by those who exercise power to those for whom or on whom they act,[10] or, put another way, the question of the protection of the individual against abuse of power by the state. Comparative law scholars over the world, under the title of " rule of law " have been considering these problems of the abuse of power, seeking ways and means whereby the abuse might be curtailed, eliminated or at least its resulting damage might be repaired.[11] In an age such as ours which places a premium on quick, effective action by close-held authority, sometimes dictated more by expediency than the form and spirit of law, the rights of individuals have on occasions been sacrificed to official action.[12] As one writer has put it, " our country is governed by the perennial attempt to weave a harmonious pattern out of social conflicts which cannot be finally eliminated."

But what are the limits beyond which a citizen may not be expected to go in surrendering his rights, and what protection will he have against a government which either exceeds these bounds or within them acts maliciously and arbitrarily so as to injure him? Perhaps no question in this community of problems is as important as this one, involving as it does the relationship of individuals to one another and to others, whether collected in groups or met one by one. The old explanation given to man about such matters is to remind him that he does not live on a desert isle; that he really should not want to live on one; that he lives in society with his fellow man and that this society is best described to him as a matter of reciprocal rights, duties, powers and privileges. This story has been repeated to countless generations, bestowing upon each individual a bundle of rights when he reaches the age of majority and placing in his hands a copy of society's rules and by-laws.

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[10] One hears with alarming frequency and from disturbingly high officials the statement that in present society no one truly makes a decision for which he must bear sole responsibility. It is fashionable to speak of the " team " or the " group " as the sharer of the action.

[11] In January 1959, at Delhi, jurists representing 50 nations came together to discuss and endorse a comprehensive formulation of the rule of law, *i.e.*, " the principles, institutions and procedures, not always identical, but broadly similar, which the experience and traditions of lawyers in different countries of the world, often themselves having varying political structures and economic backgrounds, have shown to be important to protect the individual from arbitrary government and to enable him to enjoy the dignity of man." It was Lord Denning who said of this congress that " I realised that the rule of law was wider than I thought: not limited to a preventative, negative function, but laying upon governments a positive duty—admittedly unenforceable in a court of law—to act for the welfare of their people." Dispatch to *The Times* from its correspondent in Delhi dated January 9, 1959.

[12] In opening the Congress at Delhi the Attorney-General of India is reported as pointing to " three contemporary tendencies which constituted a threat to the rule of law: first, the emergence of military dictatorships which, on the pretext of more efficient government, deprived the individual of the right to free elections and of the protection of an independent judiciary; second, the ' more subtle challenge ' posed by totalitarian régimes functioning under a façade of democratic institutions, in evaluating which, he suggested, the attitude of the State to the individual was the only true criterion; and third, the encroachments of governments, even in democratic countries, by means of delegated legislation, administrative rules, and officials who were judges of their own actions." Dispatch to *The Times* from Delhi dated January 5, 1959.

It may be that this law-picture of man's relationship to his fellow-men is the best picture which our wise men can yet offer. It has served well to explain and make possible many things which would otherwise have been impossible for man alone. Through man's creation, the state, and through his creation, the corporation, individual man has reaped many benefits. Therefore, it is tempting to say that if in the production of these benefits some harm occurs, some individuals are sacrificed, such harm is outweighed by the benefits. And once we have admitted that some harm be justified, then the next questions arise: how much? when do we reach the breaking point? who decides and how do we go about measuring it? what are the standards for too much? And throughout all this, is the question whether the state is to be thought of as the instrumentality through which the individual is liberated and served, or as the instrumentality through which men are enslaved. As long as one individual is sacrificed, the question is askable: whether the diagnosis of the problem is an accurate one.

Up to this point we have said that our assembled community of wise men might well speak of the problems of governing and the making of law. These are indeed difficult questions in these times of stirring minds and people. But it might also be well for them to say something about the problem of judging and of the making of decisions and choices.

Sometimes it appears as if the whole of one's life is a series of choices to be made among competing values, competing pleasures, competing evils, so that at times we are almost weary of such freedom as we have left and willing to turn this last bit over to a mechanical brain, which is of course just what C. S. Lewis' "*Screwtape*" would have us do. If then it is difficult enough in all conscience to make decisions for oneself, how much more difficult it must be for judges, who must make decisions which determine the lives and fortunes of others, some of whom come most unwillingly before them for such deciding. Some writer has said that the greatness of the civil law system has been said to lie in the soundness of its maxims and principles, set out with clarity in codes for all to see, while the greatness of the common law system rests in her great judges, who have made it and applied it to the problems brought before them. As John Donne tells us, "Then have lawes their reverence, and their majestie, when we see the Judge, upon the Bench, executing them." [13]

In a world full of problems, the judge is one of the problem finders, one of the problem solvers, and, as in the days of Solomon, we expect of him, wisdom. The values of which the judge approves become the values of the secular society. The folly or evil which the judge permits become the permitted bounds of social action. In times of transition and social ferment, when problems of men are less easily detected and solved, when values, old and new, strive for dominance, when we know so many facts and acknowledge so few binding principles, when we are not certain of the path to be taken as a people, as a world, as a person, the role of the judge becomes both difficult and critical in importance. In a world of haste, of short tempers, of dockets crowded with problems with which no one wants to bother, of impatience with that which does not please us, the judge is called upon to act. The rest of us may temporise, but the judge must decide, but, even more important, he must assume responsibility for his decision. It is easy enough to make a decision, if one is not responsible for it once made. It is quite a different matter if you must live with it as your child.

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[13] John Donne, *Devotions upon Emergent Occasions XX.*

Here then is a question worthy of the world's best scholars. What would they say of the proposal advanced by some that in this age of technology and specialised knowledge, judging should be done by experts in each field rather than by those whose sole study is the law? Would it be the same answer which Socrates developed so well? What would they say of the problem presented when the opinions of the experts conflict? What would they consider to be the merits of the judicial process? justice? utility? acceptance? What might they say of the statement that the judge's function is not simply to decide cases brought before him, but that judges decide policy and "make law," called upon as they are to give advice by declaratory judgment, by orders approving or disapproving plans of reorganisation in bankruptcy, by awarding the custody of children, or by giving advisory opinions as is done by the International Court of Justice?

What might the scholars answer to the question: what is the role of the judge in a case argued and presented before him? Is he a mere umpire or official who scores the points for and against the contending parties as the counsel make them? Is the proceeding in court a serious search for truth (as a scholar might seek it) or is it an institutionalised process in which adverse parties contend for victory, but not necessarily for truth, according to well-recognised rules of play? Does the judge bear personal responsibility for the truth of his decision, or may he argue that his horizon of truth is limited to those arguments which the counsel and parties present to him? [14] What shall the judge do if

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[14] The closing remarks of Lord Denning in the case of *Rahimtoola* v. *Nizam of Hyderabad* [1957] 3 All E.R. 441, at 464, raised a question which cannot lightly be put aside:

"I acknowledge that, in the course of this opinion, I have considered some questions and authorities which were not mentioned by counsel. I am sure they gave all the help they could and I have only gone into it further because the law the case binding upon him as precedent is to his mind clearly wrong? The Chief Justice of the Supreme Court of Illinois in a lecture delivered at the University of Chicago has said that the answer depends on the view which the judge takes of the function of the court. If " he views the role of the court as a passive one, he will be willing to delegate the responsibility for change, and he will not greatly care whether the delegated authority is exercised or not. If he views the court as an instrument of society designed to reflect the morality of the community, he will be more likely to look precedent in the teeth, and to measure it against the ideals and the aspirations of his time." [15]

Perhaps there has never been a time when decision-making was so important. We are told that man now holds within his hands the power to destroy himself and his civilisation, and this, at a time when, through the magic of technical advance in the transmission of sight and sound, the smallest decision anywhere in our complex society may set off reactions hitherto impossible. Yet how little skilled or trained are we in this important matter of judgment. The call to wisdom in judgment comes at a time when judgment as to moral standards, ideals and values is most tenuous, when the voices of patience and self-restraint are feeble compared with the call to expediency and the demand for rights. It comes at a time when the rapid increase of knowledge of the material world has become almost an embarrassment of riches so that we find Sir George Thomson of Cambridge saying that " the sheer bulk gets unmanageable and science may be stifled by its own fat. A man may have to know so much before he reaches the frontiers of knowledge that he will have lost his originality.

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on this subject is of great consequence and, as applied at present, it is held by many to be unsatisfactory. I venture to think that, if there is one place where it should be reconsidered on principle—without being tied to particular precedents of a period that is past—it is here in this House, and if there is one time for it to be done, it is now, when the opportunity offers, before the law gets any more enmeshed in its own net."

[15] Walter V. Schaefer, Chief Justice of the Supreme Court of Illinois in the Ernest Freund Lecture at the University of Chicago entitled "Precedent and Policy," delivered April 21, 1955.

Alternatively, and this is perhaps more likely, he will go by such a narrow path and be so specialised that he will not be able to appreciate what other people are doing." [16] What will we do in this world of strangers? one might ask.

It comes at a time when there is evidence that the judge and even the doctrine of the rule of law itself are in some areas of the world being subordinated to the executive administrator and to the doctrine of political expediency. It comes at a time when lawyers too often disclaim interest in or responsibility for the formulation of policies or laws, seeking to remain the devisers of means, the arrangers of other men's ideas, the pleaders of other men's causes. It comes at a time when man is being lured away from discussion of the real problem by recurrent threats of war and the end of mankind, so lured by his fear of insecurity that he bargains away his freedom.

But whether or not we are now best prepared to meet these questions they are here and must be treated, for we are all partakers in the world as it is, and we cannot resign. As Lord Radcliffe tells us about our times: " We seem to be losing at an alarming rate the power of independent judgment, the independent sense of value." And he goes on to warn us of the enemy, " It is enervation of soul, an abdication of personal responsibility of judgment, that we have to fear. It does not come about because evil men set out to corrupt society: it comes about because the majority of members of society will always beg not to be required to keep themselves in training." [17]

F. F. STONE.

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[16] In the Fawley Lecture given at the University of Southampton entitled " The Strategy of Research."

[17] Editorial entitled " Marked Lowering in Public Tone " which appeared in *The Times* of February 25, 1958.

SENATORS OF THE COLLEGE OF JUSTICE 1569–1578

DURING the minority of James VI there were frequent alterations in the membership of the court of session. In addition to deaths and resignations there was the effect of the civil war between the supporters of the young King and the adherents of Mary, Queen of Scots, who was imprisoned in England. Many of the judges joined the Marians and some of these were forfeited. Unfortunately the gaps in the records, particularly the books of sederunt and Pitmedden's *Abridgement*, prevent us from fixing precise dates for all of these changes. However, there are in Register House accounts of the amount of *per diem* salary paid to the judges between 1569 and 1578. These accounts, or " Residences," indicate the number of days of attendance of the judges—from March to March in the case of the " daill silver," and from Whitsun to Whitsun in the case of the " contribution silver." From this source and from the Miscellaneous Papers relating to the Court of Session (which are also preserved in Register House) we can go some way to supplement and correct Brunton & Haig, *Senators of the College of Justice.* The successors of each of the fifteen judges of 1569 are taken down to 1578. The first eight " places " are spiritual, the remainder temporal.

1. (a) *Sir James Balfour of Pittendreich, Parson of Flisk* (Brunton 110–114; *Notes & Queries* n.s. v (1958) 6–8): extraordinary lord, November 12, 1561; ordinary lord, November 15, 1563. On December 6, 1567, as the result of a dark transaction with the Regent Moray, he exchanged his office of clerk register (which he had held since 1566) for that of lord president. This change resulted in the removal of Provand from the presidency (or at least the acting presidency) on the ground, which

was true, that Provand could not be president because he was not an ecclesiastic (MS Scottish Historical Miscellanies (Register House) 217–218). On the death of the Regent Moray (January 1570) Balfour became an active partisan of the Queen; he ceased attending the court a few sederunts after March 25, 1570 (Residences); and was forfeited on August 30, 1571. Although by January 1573 Balfour himself regarded the presidency as lost (*Calendar of State Papers, Scottish*, iv. 462), the scribe who constructed the accounts betrays some doubt as to whether Balfour was still president or judge, for he brackets the name of Balfour with that of his successor, Culross, until as late as 1574 (Residences).

(b) *Alexander Colvil, Abbot of Culross* (Brunton 160–162) replaced Balfour as an ordinary lord by December 1571 (Residences) but not as lord president. The date of his *Practicks* (March 24, 1570/71. Adv. MSS 22. 2. 4. f417; 24. 1. 4. f1; 24. 1. 5, p. 231) suggests that Culross may have reached the bench much earlier. He made an abortive attempt to resign in favour of a relative in 1587 and continued as an ordinary lord until his death in 1597.

2. *Sir William Bailie of Provand* (Brunton 96): ordinary lord by November 15, 1550; "acting" president 1566–67 (*supra*). Some time after March 25, 1571, when Balfour absented himself from court, Provand resumed the *de facto* presidency, because his legal disqualification was not removed until 1579 (*APS*, iii. 153). He continued as lord president until his death in 1593.

3. *Alexander Dunbar, Dean of Murray* (Brunton 103–104): ordinary lord, 1560–87.

4. (a) *Robert Maitland, Dean of Aberdeen* (Brunton 122): ordinary lord, December 14, 1564. He ceased attending the court after the summer of 1571

(Residences)—probably because of his kinship with the other Maitlands who were forfeited for their adherence to Queen Mary—but his place was not filled until January 1576.

(b) *Sir Patrick Vans of Barnbarroch, Parson of Wigton* (Brunton 162–163): ordinary lord 1576–97.

5. *Adam Bothwell, Bishop of Orkney* (Brunton 119–120): extraordinary lord, 1564–65; ordinary lord, 1565–93.
6. *Robert Pitcairn, Abbot of Dunfermline* (Brunton 139–140): ordinary lord, 1568–84.
7. (a) *John Maitland (of Thirlstane) Commendator of Coldingham* (Brunton 140–146), son of Sir Richard of Lethington, and younger brother of Sir William of Lethington, younger (*infra*); ordinary lord June 2, 1568. With Balfour (*supra*) he ceased attending court a few sederunts after March 25, 1570; and was forfeited August 1571. His place was taken by Pont in January 1572. (Coldingham was later (1581) made a judge (in place of Archibald Douglas); he resigned in 1587.)

   (b) *Robert Pont, Provost of Trinity* (Brunton 151–153): ordinary lord, January 1572 (Calderwood, *History*, iii. 180; Residences) to 1584 when a statute prohibited ministers from being lords of session (1584 c. 6, A.P.S. iii 294).
8. *Archibald Douglas, Parson of Glasgow* (Brunton 125–128): ordinary lord, 1568; he ceased attending in late 1571 or early 1572. He was restored in 1578, his place having remained vacant. He fled and was forfeited in 1581; and his place was taken by Thirlstane (*supra*).
9. (a) *Mr. John Gladstanes* (Brunton 70–71): ordinary lord before 1542; ceased attending shortly after March 25, 1570; and was later replaced by " Boid."

   (b) *Robert*, 4th *Lord Boyd* (Brunton 155–159) is almost certainly the same as " Boid " who was an ordinary lord from at least February 1572 to about July 1573 (Residences; Boyd appears in Brunton as an extraordinary lord, but not an ordinary lord). This would agree with his appointments as a privy councillor on September 7, 1571 (*Register of Privy Council*, ii. 83) and as a judge under the pacification of Perth in 1573. *Thereafter* (October 24, 1573), as is noted in Brunton, he became an extraordinary lord; and his ordinary place was taken by Whittinghame.

(c) *William Douglas of Whittinghame* (Brunton 160): ordinary lord by about July–November 1573 (Residences; Brunton gives earliest date as October 21, 1575); resigned 1590.

10. (a) *Sir John Bellenden of Auchinoul, Justice Clerk* (Brunton 91–92): ordinary lord by 1547. He ceased attending the court by the autumn of 1575 (Residences) and died in or before 1577.

    (b) *Sir Thomas Bellenden of Newtyle* (Brunton 164): ordinary lord, in place of Sir John of Auchinoul, April 20, 1577; died 1591.

11. *Mr. James McGill of Nether Rankeillor, Clerk Register* (Brunton 99–100): ordinary lord, 1554–79.

12. *Sir Richard Maitland of Lethington* (Brunton 97–99): father of Coldingham (*supra*) and Lethington, younger (*infra*); extraordinary lord by March 14, 1551; ordinary lord November 12, 1561. He attended court consistently until Whitsun 1571 (Residences) when the suspicion attaching to his family and his own ill health may have made retiral prudent. He resumed sitting after July 1573 at least until 1578 (Residences). He was excused attendance on the ground of ill health, 1583; he resigned in 1584 and died in 1586.

13. (a) *Mr. John Spens of Condie, king's advocate* (Brunton 105): ordinary lord, November 12, 1561. He ceased attending from about June 1573 (Residences)

and died before October 20, 1573, when his place was taken by Borthwick.

(b) *Mr. David Borthwick of Lochill, king's advocate* (Brunton 154–155): ordinary lord, 1573–81.

14. (a) *Mr. Henry Balnavis of Halhill* (Brunton 60–62): ordinary lord, July 31, 1538. Forfeited 1547; re-appointed 1563–64 in place of Campbell of Lundie. He ceased attending the court in late 1569 or early 1570 (Residences) and died before October 1570.

(b) *Mr. Thomas Macalzean of Cliftonhall* (Brunton 149–150): ordinary lord, 1570 to 1581.

15. (a) *Sir William Maitland of Lethington, younger, secretary* (Brunton 106–109): extraordinary lord, 1561; ordinary lord, 1566. He ceased attending court a few sederunts after March 1569 (Residences). This was after charges of complicity in the murder of Darnley which had resulted in his imprisonment (*Calendar of State Papers, Scottish*, ii. 597–599, 674); although he was acquitted by the Privy Council (*ibid.* iii. 70), he went over to the Marians at least by 1572 (*ibid.* iii. 172). He had been deprived of Secretaryship in August 1570 (*Register of Privy Council*, xiv. 72–73) and was forfeited in August 1571. His place was filled in 1572.

(b) *Mr. William Lundy of Lundy* (not in Brunton): ordinary lord by about March 1572; resigned in favour of Segy in 1575 (Residences; Court of Session, Miscellaneous Papers).

(c) *James Meldrum of Segy* (Brunton 159): ordinary lord, July 9, 1575 (Court of Session, Miscellaneous Papers). Brunton, following Pitmedden, makes Segy the successor to William Lauder of that ilk as from July 9, 1575. This is probably an error for *Lundy* of that ilk, for there was at this time no senator of the name of Lauder. There is no separate biography of Lauder or of Lundy in Brunton. Segy died in 1588.

PETER G. B. MCNEILL.

LIABILITY ARISING FROM UNJUSTIFIED ENRICHMENT IN THE LAW OF THE UNION OF SOUTH AFRICA

AT the outset readers should be warned that this article is an attempt to condense into a very modest compass a subject of extensive scope. The past few years have seen the publication of two treatises [1] and a veritable spate of articles in the various periodic legal publications in the Union dealing with enrichment liability. It was thus with some hesitation that the writer acceded to the request of Professor T. B. Smith, during his recent visit to Cape Town, to attempt to give a survey of the subject within the limits of a journal article. Under the circumstances it is inevitable that matters which might be obscure without a somewhat lengthy exposition should nevertheless be tersely stated, that dogmatic statements should occur without the lengthy arguments and citations of authority necessary to substantiate them, that peripheral matters and problems should be ignored, and that there should be no explanation of the South African legal background—our attitude towards Roman law, the authority accorded to our institutional writers, our doctrine of *stare decisis*, etc. Perhaps it is just as well. Perhaps the writer would, by such explanations, merely be teaching a large number of grandmothers to suck eggs. He has always been rather awed by the learning of the Scots!

Definition of enrichment liability and a brief survey of some of the Western European legal systems

Enrichment liability may be defined as a liability or obligation which arises from the fact that the estate of one person has been increased at the expense of the estate of another without a ground sufficient in law to justify the shift of value, and which places an obligation on the person enriched to restore the object of the enrichment or, where that is not possible, to pay compensation, to the person impoverished.[2]

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[1] *'n Oorsig van Onregverdige Verryking as Gedingsoorsaak in die Suid-Afrikaanse Reg* by D. G. John, and *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* by the present author.

In the Roman law as reflected in the *Corpus Iuris*, there were enrichment actions which could be instituted under certain specific circumstances, but there were also gaps between the various actions. Unjustified enrichment was not a *causa obligationis* in general, like contract or delict. If the person who had suffered the loss was unable to fit the facts of his case into one of the established categories, he was without a remedy. We can say, therefore, that Roman law did not recognise a general enrichment liability. This introductory statement will be expanded later in this article.[3]

These old actions passed into the Romanistic common law of Europe. In France it was especially Molinaeus and Pothier who busied themselves with enrichment liability. True, they did not mention enrichment *sine causa* as a separate source of obligations, but in constructing their legal systems they proceeded as if this were in fact the position. In the Napoleonic Code unjustified enrichment in general is not mentioned as a source of obligations. We find instead that the approach is casuistic, like the approach in the *Corpus Iuris*, and that a number of special cases like *solutio indebiti* are dealt with. At first the courts refused to admit enrichment liability outside the cases specifically dealt with in the Code but writers on law urged that these special cases could only be explained on the assumption that there existed a general principle of liability and that the silence of the Code thus could not be held to exclude a general enrichment liability. Since 1892 the courts in France, including the Cour de Cassation, have recognised unjustified enrichment in general as a source of obligations, and detailed rules have since been evolved.[4]

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[2] See in general: Witte: *Die Bereicherungsklagen*; Von Mayr: *Bereicherungsanspruch*; Pekelharing: *Onrechtvaardigde Verrijking*; Van der Leij: *Terugvordering van Vermogensvermeerdering zonder Oorzaak naar Nederlandsch Recht*; Bregstein: *Ongegronde Vermogensvermeerdering.*

[3] See pp. 130 *et seq.*, below.

In the Netherlands the Burgerlijk Wetboek, which came into force in 1838, shows a strong resemblance to the French Code, also as regards enrichment liability. Pekelharing in 1897, and Bregstein in 1927, submitted that the Dutch courts should follow the example of the French courts and should recognise a general action, but Van der Leij in 1910, while also advocating a general enrichment liability, felt that in view of the hiatus in the Code, the courts would be going too far, and would be arrogating legislative competence to themselves, were they to recognise such a general ground of liability. He suggested an addition to the Code to the effect that:

"In all cases where one person's estate is increased at the expense of another person's estate without there subsisting between the parties a particular legal relationship justifying this increase, the party suffering loss has the right to reclaim the unjustified enrichment from the person enriched."[5]

According to Bregstein, some judgments delivered since 1935 do recognise a general enrichment liability.[6] Since neither Bregstein's article nor the reports of the cases to which he refers are available to the writer, comment on his claim is not possible.

Some years ago the Dutch Government asked the late Professor Meijers of Leiden to draft a new Code. He followed the procedure of putting questions on specific matters to the Legislature to receive guidance on matters of principle and policy. Question No. 18 was whether there should, or should not, be a general enrichment liability. The answer was in the affirmative. As far as the writer is aware, the section of the draft Code dealing with obligations has not yet been published.

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[4] See Bregstein's treatise, the whole.

[5] The works of these writers are cited in footnote 2. All the translations in this article are by the writer.

[6] See the article by Bregstein: "L'Enrichissement sans Cause," in *Travaux de l'Association Henri Capitant*, Vol. 4, 1948, pp. 56–87, cited by Challies: *The Doctrine of Unjustified Enrichment in the Law of the Province of Quebec*, 2nd ed., p. 163.

When we turn our attention to Germany we find that the German common law gradually generalised the specific enrichment actions of Roman law into a general enrichment action. From the eighteenth century onwards codes were introduced into the various German States and some of these codes also recognised a general enrichment liability.[7] In 1900 the German Civil Code which is still in force—in the Federal Republic at any rate—came into force. Section 812 creates a general enrichment liability and sections 813 to 822 deal with certain particular aspects of enrichment liability. The dominant section 812 reads as follows:

> "A person who acquires something without legal cause at the expense of another as a result of an act performed by the latter (Leistung), or in some other manner, is bound to make restoration. This liability also exists when the legal ground later falls away or where a result, which according to the content of the juristic act, was intended to be achieved by the performance, is not achieved.
>
> "The legally binding admission of the existence or non-existence of a liability is also held to be a performance."[8]

The development of this branch of the law in Switzerland is similar to that in Germany. Here, too, we find a general enrichment liability arising in the common law, and this liability was recognised in and regulated by the Code of

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[7] See Witte, *op. cit.*, Von Mayr, *op. cit.*, pp. 1–24; Pekelharing, *op. cit.*, pp. 64–75; Van der Leij, *op. cit.*, pp. 7–36; Windscheid: *Lehrbuch des Pandektenrechts*, 8th ed., §§ 421–429.

[8] For an exposition of the German Law on this topic, see the treatise of Von Mayr and also, Enneccerus-Lehmann, *Lehrbuch des Bürgerlichen Rechts*, Vol. 2 (Schuldrecht), pp. 844 *et seq.* (This is the 14th edition of the treatise formerly associated with the names of Enneccerus-Kipp-Wolff).

Obligations of 1881.[9] This early Code was superseded in 1912 by the first part, and in 1937 by the second part, of the Federal Code of Obligations which is still in force. Section 62 of this Code corresponds to section 812 of the German Code and provides:

> "Any person who is enriched without legal cause at the expense of another is bound to make restitution. The enrichment must particularly be returned where it was received without a valid cause, because the cause was not realised, or because the cause has ceased to exist."

Sections 63–67 deal with specific aspects.[10]

The legal systems of many other countries, which we cannot here consider, recognise unjustified enrichment as a *causa obligationis*. I merely mention in passing Quebec and Belgium, where the Codes are silent and the general liability is the creation of the courts; Italy (sections 2041–2042 of the Code); Austria (sections 1041–1043 of the Code); Russia, Turkey, and the old Chinese Code abolished by the Communists.[11]

The justification for this brief excursion into the legal systems of foreign countries in an article which purports to deal with the legal system of South Africa is threefold. In the first place it shows that many legal systems have felt the need for such a source of liability and that this need has been provided for, whether by legislation or adjudication. Secondly it shows that the trend in many countries which share a common legal heritage has been on parallel lines. Thirdly, it was necessary to give the reader some idea of the position in those legal systems to which it is reasonable for the South African jurist to turn for guidance when he finds himself on uncharted seas voyaging alone. It is more reasonable that we should turn to the Romanistic legal systems of Europe, so closely akin to our own, even in their codified form, than to Anglo-Saxon law which is, by and large, completely foreign to our Roman-Dutch system. It is impossible to build up a complete and rounded doctrine of enrichment liability without wandering outside the four corners of the traditional South African legal sources. From time to time it is necessary to invoke the authority of modern Continental law, and the present writer, in attempting to construct a complete doctrine of liability from unjustified enrichment, has certainly leant heavily on German and Swiss law.

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[9] See Pekelharing, *op. cit.*, pp. 88–89.

[10] For a discussion of modern Swiss law on the subject, see Von Tuhr-Siegwart: *Allgemeiner Teil des Schweizerischen Obligationenrechts*, 2nd ed., Vol. 2, pp. 400 *et seq.*

[11] See Challies, *op. cit.*, pp. 168–169, regarding these other legal systems.

With this brief survey by way of introduction then, let us turn our attention to South African law and inquire to what extent unjustified enrichment is a source of liability. We cannot, however, deal with modern law immediately. A brief survey of the historical development is essential for an understanding of the modern law, and thus we must commence with an examination of the Justinian law as reflected in the *Corpus Iuris*, and then deal with the classical Roman-Dutch law of the seventeenth and eighteenth centuries.[12]

Roman Law

When we speak of enrichment liability in Roman law, we think in the first place of the various *condictiones sine causa*. We may say, briefly, that these *condictiones* were actions which lay for the reclaiming of property which one person had handed over in ownership to another for a *causa futura* which was not realised[13]; or in pursuance of an illegal or immoral agreement[14]; or in payment of a debt which the payer thought he owed to the receiver but did not in fact owe[15]; or for a cause which had later disappeared or had never existed.[16] If the receiver could no longer return the article itself, he had to pay the amount by which he was actually enriched; *e.g.*, if the person to whom *solutio indebiti* had been made had sold the article, he handed over the money he had received. If he were no longer enriched, *e.g.*, where the article had perished, he was altogether freed from liability. His knowledge of his enrichment, and also *mora* on his part in discharging his enrichment debt, did however influence these rules. This will be dealt with in the section on modern South African Law.[17] The *condictio sine causa* also lay where the owner of an article had handed over the possession, not the ownership, of the article to somebody who then in good faith consumed the article, or alienated it, under such circumstances that the owner could no longer vindicate it. He also had to pay to the extent that he was enriched.[18] There was no action unless there had been a *negotium*, a legal transaction of some kind, between the parties.[19] Neither was there an action to recover by any of these *condictiones* the value of a *factum*, of services.[20]

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[12] By contrasting "classical Roman-Dutch law" with "modern South African law," it is not intended to suggest that modern South African Law may not justly be termed "Roman-Dutch law." This terminology becomes necessary when the different historical stages of legal development are separately examined.

[13] The *condictio causa data causa non secuta*. See in general, D.12.4; C.4.6.

[14] The *condictio ob turpem vel iniustam causam*. See in general, D.12.5; C.4.7. The rule *in pari delicto, potior est conditio defendentis* applied.

The *condictio furtiva*, by which the owner of stolen property could sue the thief for either the return of his property or for the payment of its value plus any additional loss he had suffered as a result of the theft,[21] is mentioned by some writers as an enrichment action[22]; but it seems more correct to construe it as an action *ex delicto*.

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[15] The *condictio indebiti.* It was only in exceptional circumstances that a person who had paid *per errorem iuris* was allowed to sue. See in general, D.12.6; C.4.5.

[16] The *condictio sine causa stricto sensu.* Where the cause had disappeared, the term *condictio ob causam finitam* is also used. See in general, D.12.7; C.4.9.

[17] See below.

[18] See Inst. 2.8.2; D.12.1.12; 12.1.18.1; 24.1.5.18.

[19] See D.12.6.33; Coninck Liefsting: *Rechtsgeldigheid van Verbintenissen uit Overeenkomst*, p. 145, footnote, 128; Van Oven: *Leerboek van Romeinsch Privaatrecht*, 2nd ed., p. 368; Hijmans: *Romeinsch Verbintenissenrecht*, 2nd ed., p. 310. There were exceptions to this rule, as is evidenced by D.12.1.23.

[20] D.12.6.26.12 allows a freedman who had made a *solutio indebiti* of *operae fabriles* to his *patronus* to condict their value. Some writers have seized on this text as showing that the value of a *factum* could be condicted. See for instance Glück: *Ausführliche Erläuterung der Pandekten*, Vol. 13, p. 73, § 827; J. A. Fruin in 1857, *Themis*, p. 364; Von Lübtow: *Beiträge zur Lehre von der Condictio nach Römischen und Geltendem Recht*, pp. 52–53. As Liefsting shows, however, *libertorum operae* were held to be *things*, not *facta*, and thus this text does not militate against the statement that the value of a *factum* could not be condicted. See Liefsting, *op. cit.*, pp. 78–88. See further Van Oven, *op. cit.*, pp. 301, 303. See in connection with the *condictiones* generally, Von Koschembahr-Lyskowski: *Die Condictio als Bereicherungsklage im klassischen Römischen Recht*; Von Mayr: *Die Condictio des Römischen Privatrechtes.*

When a person had undertaken the management of the affairs of another without mandate from that person, he acquired against that other the *actio negotiorum gestorum contraria* for the reimbursement of all his expenses, whether the affair turned out well or ill, provided that the act of management was *utiliter coeptum*.[23] He could, for instance, claim the sum which he had paid to a doctor called in to attend to a sick slave, even if the slave had died. We cannot therefore, call this an enrichment action.[24] Under exceptional circumstances the action of the *gestor* was, however, a true enrichment action, namely where the *dominus* whose affairs had been managed was a minor,[25] and where the *gestor* had interfered with a view to his own benefit rather than with a view to assist the *dominus*.[26] The *gestor's* action could thus lie for money spent on, or the value of, a *factum*.

A person of limited contractual capacity such as a minor or lunatic, who had contracted without the necessary authority or assistance, was bound to restore what had been transferred to him in ownership or had to pay the amount by which he was enriched if restoration was not possible, if the other party had made performance and the person of limited capacity preferred not to carry out the agreement.[27] Here, too, the value of a *factum* had to be paid.

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[21] See in general, D.13.1; C.4.8.

[22] See for instance, Noodt: *Commentarius in Libros XXVII Digestorum*, ad D.13.1; Van Oven, *op. cit.*, p. 343; Sohm: *Institutes of Roman Law*, English translation by Ledlie, 3rd ed., p. 410.

[23] See in general, D.3.5; C.2.18(19).

[24] The purpose and scope of the gestor's action are clearly set out in Inst. 3.27.1; D.44.7.5.

[25] See D.3.5.5.2(6.pr.); 3.5.36(37).pr.; C.2.18(19).2.

[26] See D.3.5.5.5(6.3). This text was not applicable to the *bona fide* possessor, or the *mala fide* possessor. See D.44.4.14; C.3.32.5, and the remarks of Voet: *Commentarius ad Pandectas*, 3.5.9.

[27] See D.3.5.5.2(6.pr.); 13.6.3.pr.; 16.3.1.15; 26.8.5.pr.; C.2.37(38).1; Moyle: *Contract of Sale in the Civil Law*, pp. 11–15; Sohm, *op. cit.*, pp. 216–217; Niederländer: *Die Bereicherungshaftung im Klassichen Römischen Recht*, pp. 89–129;

Where a *bona fide* possessor of another's property had enhanced the value of the property, he could refuse to evacuate or to hand the property back to the vindicating owner by invoking the *exceptio doli* until offered compensation for all his necessary expenses, and for either his useful expenses or the actual enhancement in the value of the property, whichever was the lesser. Here again we have the possibility of compensation being paid for a *factum*. The value of fruits consumed by the possessor before *litis contestatio*, less any costs incurred in connection with them, was deducted from his expenses because they reduced his impoverishment. The owner could vindicate fruits still in existence, but he had no *action* for the value of fruits consumed before *litis contestatio*. Alternatively the possessor could, if he so wished, remove what he had attached if the owner refused to pay compensation, provided that he did not by such removal leave the property in a worse condition than it would have been in, had he not made the attachment; and, in any event, the person enriched was allowed to reject his enrichment if the nature of the improvements and his position made that reasonable. The results of luxurious improvements the possessor could only remove.[28]

The possessor had no *action*. He could not sue as *gestor*, because he did not act *animo alieni gerendi*,[29] and he could not institute the *condictio sine causa* because there had been no *negotium* between the parties.[30]

The position of the *mala fide* possessor was in a state of flux, and no discussion is possible here.

The rules set out above related to the possessor of a *res singularis*. The possessor of a *res universalis*, an inheritance, was in a somewhat more favourable position, but it is not necessary to discuss the differences here. It is sometimes said that the *possessor hereditatis* was himself

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Van Oven: "Handelingen door den Pupil zonder Bijstand van den Voogd Verricht," article in 1939 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg*, pp. 87 *et seq.*

[28] See Inst. 2.1.30, 32, 33, 35; D.6.1.23.4; 6.1.27.5, 6.1.38, 48; 41.1.9.1.

[29] See D.10.3.14.1.

[30] See D.12.6.33. See further Pekelharing, *op. cit.*, p. 22.

bound on account of enrichment to return as much of the inheritance as he still possessed or the amount by which he was enriched. This was in fact the *scope* of his liability, but his liability was not an enrichment liability. The better view is that the *petitio hereditatis* was substantially a vindicatory action with special characteristics and that where the possessor returned the value of goods he had once possessed but no longer possessed but of which he still possessed the value, it was a case of "real subrogation." [31]

A lessee who had improved the property could claim compensation by an action.[32]

A fiduciary [33] and a usufructuary [34] could similarly claim compensation.

Where one person had, in good faith, attached the property of another without that other's consent to the former's property so that *accessio* took place, the person losing his property had an action for the value of his property, and in some cases for double the value of his property.[35] The enrichment of the attacher was not looked at, so that we can say that these actions were not enrichment actions.

A final action must be mentioned—the *actio de in rem verso*. Where a slave, or a son in power, had entered into a contract with another, the owner or father was liable on the contract to a certain extent. The *pater dominusve* could be sued on the contract, firstly, up to the amount that the performance by the other party had enured to his benefit (in which case we speak of the *actio de in rem verso*) and secondly, for the balance, up to the amount of the *peculium* of the son or slave (the *actio de peculio*).[36]

The *actio de in rem verso* is not to be entirely divorced from the concept of enrichment. It has undergone a veritable hypertrophy in French law where legal writers seized on it as the basis for their general enrichment action. We also find traces of an *actio de in rem verso utilis* in the Codex[37] and the concept underlying this extension of the action found a powerful exponent in the person of the Frisian jurist, Ulrich Huber. The reverberations have unfortunately reached modern South African law. The choice of the adverb will be justified further on in this article.[38] At this stage it is sufficient to point out that the simple *actio de in rem verso* was not an enrichment action. It was a liability for the contractual obligations of another who stood in a special relationship to the person liable with the liability to a certain extent limited to enrichment.[39]

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[31] See Van Oven, *op. cit.*, p. 569.

[32] See D.19.2.55.1.

[33] See D.12.6.40.1; 30.58–61; 36.1.20(19).2; 36.1.23(22).3.

[34] See C.3.33.7.

[35] See Inst. 2.1.29; D.6.1.23.5,6; 41.1.7.10.

[36] See Inst. 4.7.4; D.15.1; 15.3; Van Oven, *op. cit.*, pp. 486–487.

This completes our brief survey of Roman Law and it remains to draw conclusions.

We note then in the first place that the many maxims in Roman law which state that one person is not to be allowed to enrich himself at the expense of another without just cause[40] (which latter requirement is not found in all the maxims) received practical application through a number of enrichment actions and other remedies where there were no actions (*e.g.*, in the case of the *bona fide* possessor).

It may be pointed out in passing that the various enrichment actions were what we may term undeveloped or imperfect enrichment actions. In a fully developed enrichment action account is not taken merely of what has come to one person from the estate of another. It might be that there were harmful events collateral to or coincident with the enrichment.[41] Harmful events coincident with the enrichment are events which have a juridically relevant connection with the enrichment, and which serve to counteract or to diminish the increase in the patrimony of the person enriched. To determine the actual, effective enrichment, and thus the liability, account must be taken of such factors. As examples there may be mentioned counter-performance made by the person enriched in pursuance of the same void agreement by virtue of which he received performance; harm suffered by the person enriched in consequence of a defect in what was delivered to him such as disease contracted by his cattle in consequence of disease in cattle delivered to him as a *solutio indebiti*; harm done to land which he had improved in certain respects by a *bona fide* possessor; and many others.[42] In a fully developed enrichment action these matters are taken into account and the plaintiff is entitled to recover the article he has given or the value which has passed from his estate into the defendant's estate only if he at the same time tenders to restore what *he* has received from the defendant or to pay its value, or in other cases, to pay the amount of the loss which the enrichment had occasioned the person enriched. If the person enriched has to pay a sum of money and if that which must be brought into account against his enrichment is also a sum of money, there is of course simply a deduction.[43] We do not find that these rules operated in Roman law. True, a defendant who had spent money on an article which had been given to him without just cause could claim to be reimbursed to the extent that the value of the article, which he now had to return, had been enhanced[44] but he could not obtain compensation for the excess which he had spent. We have then the position that under certain circumstances a person enriched, who had discharged his enrichment liability, would actually be in a worse position than he would have been in had the enrichment never taken place. It is interesting to note that one may also find beneficial collateral events associated with the impoverishment and that, in the case of the *bona fide* possessor who had spent money on improving the property and had also enjoyed the fruits of the property, this beneficial collateral event was taken into account, and that the value of the fruits was deducted from his expenditure, as set out above.

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[37] See C.4.26.7.3(1). But see also C.4.2.15.

[38] See below.

[39] See Pekelharing, *op. cit.*, p. 25.

[40] See for instance D.12.6.14; 12.7.1; 25.2.15; 15.17.206.

[41] This is the best rendering into English of the Afrikaans "skadelike newewerkinge" and the German "schädliche Nebenwirkungen" of the enrichment, which has occurred to the writer; there does not seem to be an English phrase which exactly conveys the concept he has in mind. *Cf.* the Latin *damnum cum lucro.*

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[42] See Von Tuhr-Siegwart, *op. cit.*, pp. 420–426, for an excellent discussion.

[43] See, for instance, Von Tuhr-Siegwart, *op. cit.*, pp. 420–426; Enneccerus-Lehman, *op. cit.*, pp. 883–884; Van der Leij, *op. cit.*, pp. 101–104; Bregstein, *op. cit.*, p. 155. The deviating views propounded by Von Tuhr in his article "Zur Lehre von der Ungerechtfertigten Bereicherung" in the *Festgabe für Bekker*, pp. 314 *et seq.*, have not met with approval.

[44] See D.12.6.26.12 and 12.6.65.5.

The most important conclusion to be drawn is that there was no general enrichment liability in Roman law. In this regard, Roman law was casuistic. The person impoverished did have a remedy provided that he could fit the facts of his case into one of the recognised categories which have been sketched in outline; but if he could not do so, he was without a remedy. Thus, the value of a *factum* could not in general be claimed with the *condictiones sine causa*; the *condictio sine causa specialis*, used under certain circumstances when the other *condictiones sine causa* (*generalis*) could not be used, demanded a *negotium* between the parties; a possessor had no action for the value of improvements made by him, and a *bona fide* occupier [45] and a person holding *precario* [46] had no remedy at all. Neither did a person who had lost the ownership of his property in consequence of a *bona fide specificatio* have a remedy.[47]

It must furthermore be noted that some of the enrichment actions were *condictiones* and some were not,[48] that some were quasi-contractual actions while others were not. The concept of enrichment was not analysed. It is impossible to see any systematic approach in this patchwork quilt of remedies.

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[45] For the purposes of enrichment liability we may define a possessor as one who possesses the property of another *animo domini*; that is, either with the impression of being owner, or else, knowing he is not the owner but pretending to be, acting as if he were. An occupier then is a person who possesses the property of another, knowing he is not the owner and not pretending to be, but either having the right to possess (rightful occupier) or erroneously believing that he has the right to possess (*bona fide* occupier), or else acting as if he has the right to possess while he knows that he has no such right (*mala fide* occupier). This distinction is of especial importance to modern South African law and will be dealt with further below. It may be pointed out that some rightful occupiers did have rights of compensation, as for instance lessees and usufructuaries, as was pointed out above.

[46] See Sohm, *op. cit.*, p. 335, footnote 5; Windscheid, *op. cit.*, § 376, footnote 7.

[47] See Hijmans, *op. cit.*, p. 309; Buckland, *Textbook of Roman Law*, 2nd ed., pp. 217–218.

[48] See in connection with this fact, Von Mayr: *Bereicherungsanspruch*, p. 1.

Von Tuhr gave a good summary of the position when he wrote: " Thus the Roman Law provides us here, as in other fields, with an unfinished, chequered picture. The Roman jurists accepted the legal concept of enrichment (liability), but the application of this concept had to take place within the framework of the specific actions to the extent that the nature of each particular action lent itself to the necessary modification of its content." [49]

This conclusion is generally accepted by writers on this subject.[50]

The classical Roman-Dutch law of the seventeenth and eighteenth centuries

The *condictiones sine causa*, shorn of whatever procedural importance might still have attached to them in Justinian's law, passed into the Roman-Dutch law with but few changes.[51] The relevant changes are briefly mentioned below. The names of the various *condictiones* remained as useful labels to indicate specific remedies arising from certain facts.

Error iuris was no longer a bar to the *condictio indebiti.*[52]

A *negotium* was no longer required for the *condictio sine causa.*[53] This change had less effect on the law than might have been expected. Its only practical result was to raise difficulties where property had passed through the hands of a number of persons who had no right to handle it but who *bona fide* thought they were the owners, and where the owner could no longer vindicate the property because it had been consumed or lost or he could not trace the final possessor. The disappearance of the *negotium* requirement brought with it the possibility that he could sue each one of the intermediaries.[54] There are, indeed, writers who state that he could do so, but they limit the liability of the intermediaries to the liability to return merely the profit made from the resale of the use.[55] A moment's reflection will show however that it would in fact be impossible to calculate profit of the intermediaries, for as soon as any intermediary is sued, he may sue his own predecessor in title, the person who had sold the article to him, for the partial eviction. If this intermediary had already relinquished his profit, he would now suffer loss in paying compensation to his predecessor. He might himself succeed or fail in recovering from *his* predecessor. The only acceptable solution would appear to be to protect *bona fide* intermediaries who gave value for the article and to allow the owner to sue only those intermediaries who had received the article *ex causa lucrativa.* This view is also propounded and probably reflects the Roman-Dutch law.[56]

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[49] Von Tuhr on p. 303 of his article on enrichment in the *Festgabe für Bekker*, cited in footnote 43 above.

[50] See for instance, Von Mayr: *Condictio*, pp. 303 *et seq.*; Hijmans, *op. cit.*, p. 310; Van der Leij, *op. cit.*, p. 10.

[51] See in general, Groenewegen: *De Legibus Abrogatis*, ad D.12.4; 12.5; 12.6 and 12.7; Voet, *Commentarius ad Pandectas*: 12.4; 12.5; 12.6 and 12.7; Grotius: *Inleiding tot de Hollandsche Rechtsgeleerdheid*, 3.30.

[52] See Peckius: *Tractus de Testamentis Coniugum*, 1.38.3,9; Christinaeus: *Decisiones Curiae Belgicae*, Vol. 3, Decisio 8, n. 3; Grotius 3.30.6; Vinnius: *Selectae Quaestiones*, 1.47; Huber: *Heedendaegse Rechtsgeleertheyt*, 3.35.2; Van Leeuwen: *Censura Forensis*, 1.4.14.3; Van der Keessel, *Theses Selectae*, Th. 796; Van der Linden, *Koopmans Handboek*, 1.15.15. Voet, 12.6.7 and Schorer, note 19 ad Grotium 3.30.6 however follow the Roman Law in this regard.

[53] See the gloss on C.4.9.3; Bartolus, ad D.12.1.32; Accursius and Antonius Faber, ad D.19.1.30.pr.; Grotius, 3.30.18; Huber: H.R., 3.35.16; Voet, 12.7.2.

The action of the *gestor* survived in a substantially unchanged form [57]; and the same may be said regarding the enrichment liability of persons of imperfect contractual capacity enriched by the performance towards them in pursuance of an agreement into which they had entered without the necessary authority.[58]

The *bona fide* possessor of another's property which he had improved had all the rights which he had in Roman law. Moreover, the fruits which he had collected and still possessed at the time of *litis contestatio* could no longer be claimed by the owner.[59] There was, however, an important advance in the law—the possessor now had a right of action in addition to his *ius retentionis.*[60] It is of importance to note that the attitude of the Dutch writers was not that there was a general enrichment liability and that the *bona fide* possessor therefore had to have an action, just like any other person at whose expense somebody had been enriched. They invoke earlier writers in support of this extension of an action to a *bona fide* possessor, and these earlier writers granted an action because they felt that it was unreasonable to admit that the possessor was entitled to compensation but to deny him an action, which was the position in Roman law. These earlier writers all attempt to extend an already existing action so as to cover the case of the possessor. The classification of the possessor's action as an *actio negotiorum gestorum utilis* would appear to have found most favour.[61] The approach is thus still casuistic and it would appear that the indulgence was limited to *bona fide* possessors and *mala fide* possessors. Thus *bona fide* occupiers did not have an action.

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[54] *Cf.* the "doctrine of conversion" of English law.

[55] See Antonius Faber, ad D.12.1.23; Struvius: *Syntagmata Jurisprudentiae*, ad D.6.1.n.13; Carpzovius: *Definitiones Forenses*, 4.40.9; Schorer, notes 11 and 12, ad Grotium 2.3.5.

[56] See the gloss on D.12.1.23; Bartolus and Brunnemann ad 12.1.23; Voet, 6.1.8; 6.1.10; Huber: H.R., 3.35.16.

[57] See Grotius, 3.27; Groenewegen, ad D.3.5; Voet, 3.5.

[58] See Grotius, 1.8.5; 3.1.26; 3.6.9; 3.30.3; Voet, 3.5.8; 15.1.11; 26.8.2; Van der Keessel, Th. 529.

Mala fide possessors were entitled to claim the same compensation as *bona fide* possessors, and also had a *ius retentionis.*[62]

Lessees were initially treated like *bona fide* possessors as regards their rights of compensation but eventually their rights of compensation were severely limited by statute.[63]

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[59] See on the question of the fruits, Voet, 41.1.35; Groenewegen, ad C.3.32.22; Van der Keessel, Th. 205.

[60] See Vinnius: *Selectae Quaestiones*, 1.24; *Commentarius ad Institutiones*, ad Inst. 2.1.30; Groenewegen, ad Inst. 2.1.30; Huber: H.R., 2.6.16; Van Leeuwen: Cens. For., 1.2.5.10; Schorer, note no. 14 ad Grotium 2.10.9; Van der Keessel: *Dictata ad Grotium*, 2.10.8.

[61] For a survey of the historical development and a full discussion of the views of the various medieval and humanist jurists the reader is referred to the treatise of Dr. John, cited in footnote 1 above, pp. 18–57.

[62] See Groenewegen, ad Inst. 2.1.30; ad C. 2.18(19).24; 3.32.2; Voet, 5.3.23; 6.1.36; Van Leeuwen: Cens. For., 1.2.5.10; 1.2.11.7,8; Schorer, note no. 14 ad Grotium, 2.10.9. Grotius, 2.10.8 and Van der Keessel, Th. 214, however, give an action only for necessary improvements. Thieves had no rights to compensation. See Voet, 6.1.36; 13.1.6

Where A had in good faith attached the property of B to the property of A so that *accessio* took place, Roman-Dutch law allowed B a right of action to claim simply the value of his property,[64] and the same applied in the case of *specificatio*.[65] These actions were thus not enrichment actions, just as the corresponding actions in the Roman law were not enrichment actions, because account was taken merely of the loss of the one party, and the gain of the other party was not considered. They were in effect surrogates of the *rei vindicatio*.

Mention has been made in the section on Roman law of the *actio de in rem verso utilis* which in the Netherlands is especially coupled to the writings of Ulrich Huber. This matter can be more conveniently treated when dealing with the requirements of the general enrichment action in modern law.[66]

The picture which has thus far been painted of Roman-Dutch law, as far as enrichment liability is concerned, shows substantially the position which applied in Roman law; that is to say, there were specific enrichment actions but no general action. It is true that there had been certain developments, but there were still gaps between the actions. It might perhaps be objected that Grotius, at any rate, recognised in unjustified enrichment in general a cause of action. His language in 3.30.18 is very wide and might at a first glance appear to be the formulation of a general action. Further analysis, however, indicates that he was there dealing merely with enrichment in consequence of the acquisition of ownership of things, in other words with the

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[63] See the Placaet of 26th September, 1658 (*2 Groot Placaet Boeck*, column 2515), and the Placaet of 24th February, 1696 (4 G.P.B. p. 465).

[64] See Groenewegen, ad Inst. 2.1.29, 33; Voet, 41.1.22; 47.3.2.

[65] See Grotius, 2.8.4; Van Leeuwen: *Rooms-Hollands Regt*, 2.5.3.

[66] See below.

condictio sine causa.[67] Van Bynkershoek reports a case[68] in which the Appeal Court of Holland felt that the plaintiff was entitled to compensation but it was not clear which "action" could be used. Had a general enrichment action existed, it would surely have been invoked. We find instead a frantic searching for an established category within which to force the facts of the case, and every member of the court suggested a different action. In the result, the action was successful. The impression left by this case is that the approach was definitely still casuistic. The writer has been able to find but one case, also reported by Van Bynkershoek, in which the court simply allowed a claim on grounds of equity and made no attempt to classify.[69] It does not appear warrantable to conclude on the strength of this one case, and in opposition to the picture presented to us by the writers, that the classical Roman-Dutch law recognised a general enrichment liability, although one may say that there was a tendency to extend the scope of the remedies.[70]

It may be concluded then that, with the exception of those cases in which the value of a *factum* could be claimed according to Roman law, an enrichment action did not lie for the value of a *factum*,[71] and that a *bona fide* occupier had no remedy for improvements made by him to the property he had occupied.

WOUTER DE VOS.

(*To be continued*)

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[67] See Voet, 12.7.2; Scheltinga, *Dictata ad Grotium*, 3.30.18; Aquilius: "Immorality and Illegality in Contract," 1942 *South African Law Journal*, p. 21. It may also be pointed out that in his *De Iure Belli ac Pacis*, 2.10, where he discusses the duty to pay compensation for unjustified enrichment as a rule of the Law of Nature and then mentions examples from the positive law where effect is given to this rule, Grotius does not state that in Holland there was a general enrichment liability. The remarks made in the text above on the passage from Grotius apply also to Huber, 3.35.16.

[68] *Observationes Tumultuariae*, No. 586.

[69] *Observationes Tumultuariae*, No. 303.

[70] It is interesting to note that the Kemper Draft Code of 1820, which was based on the Roman-Dutch Law and which was never promulgated, does create a general enrichment liability. See section 2891.

[71] It must be admitted that Voet, alone of the writers, states that the value of a *factum* could be claimed with the *condictio indebiti*. This is his view of Roman law, and he relies on D.12.6.26.12, which has been dealt with on p. 131 above.

ON A MODERN APPROACH TO JURISPRUDENCE

I

SINCE the appearance of Professor Hart's " Definition and Theory in Jurisprudence " in 1954 [1] the attention of jurists has been directed to a new approach to the problems of jurisprudence—an approach which, in the field of philosophy, has become known as linguistic analysis.

In so far as this approach heralds a break with traditional methods it is something of definite significance. It is the purpose of this article to attempt to demonstrate this significance by examining the history and development of the method and also to offer some reflections on the value of the method as applied to law, at the same time comparing it with other approaches.

If we look at the early pages of Professor Hart's inaugural lecture we are brought face to face with the basic techniques of the method. According to Hart, the method of definition in jurisprudence differs from the methods employed in other fields of discourse concerned with describing facts. There are no facts in the physical world which correspond to such basic concepts as right, duty or corporation.[2] In effect, these concepts have logical peculiarities of which we must be aware. Hart goes on to point out the definitional errors involved in the approaches of other schools of thought such as the Realists and Scandinavian jurists. The representatives of these schools are led astray in identifying law with one or other of the features of a legal system. They are led astray in thinking that there must be a " fact " to which the concept corresponds.[3]

Allied to this criticism we find the view expressed that definitions such as these, which are based on a particular theory of law, really do not throw light on the way in which the basic concepts operate in the legal system. " They seem to the lawyer to stand apart with their head at least in the clouds; and hence it is that very often the use of such terms in a legal system is neutral between competing theories."[4] The idea which is implicit in this statement is that the approach of the lawyer should be centred on the use of these concepts in a particular legal system not on general theories as to the nature of these concepts.

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[1] (1954) 70 L.Q.R. p. 37.

[2] *Ibid.* at 38.

[3] *Ibid.* at 38–40.

Now this concentration on linguistic usage is really a modern phenomenon.[5] One can, of course, detect linguistic analysis in the works of early philosophers such as Plato and in the works of later writers such as Bentham, but it does not constitute the main part of their work. One may say that the first major step in the development of linguistic analysis in England was taken about the turn of the century. At that time, Russell and Moore reacted strongly against the idealist philosophy of Hegel and Bradley which viewed philosophy as a matter of system building and as based on a particular dialectic.

According to Russell, the idealist philosophers employed the wrong methods in studying reality. Russell was concerned especially with the notion of the particular: in his mind the philosopher ought to be concerned with particular facts, not with metaphysical notions such as the absolute. Over a period of time Russell's views crystallised into a particular philosophical theory—logical atomism—in which logical analysis played an important role.[6]

One of Moore's major contributions was in the field of ethics. In the *Principia Ethica* Moore analysed the word " good." He opposed the then current ethical theories which identified " good " with some object of desire such as happiness. He drew attention to the fact that the word " good" had a logic of its own. It was not a natural property such as " red ": it was a " non-natural " property.[7]

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[4] (1954) 70 L.Q.R. at 40.

[5] Within the confines of this article I can give only a very brief summary of the ideas which contributed to the development of linguistic analysis. Therefore one may find many omissions.

[6] Russell succinctly states his early views in " My Philosophical Development," *Encounter*, Feb. 1959, pp. 18 *et seq.* See also Urmson, *Philosophical Analysis* (1956), Part I, pp. 1–98.

After the First World War, the work of another great philosopher appeared in an English translation: Ludwig Wittgenstein, *Tractatus Logico-Philosophicus*.[8] The approach of Wittgenstein at this period had much in common with Russell's views. The concentration on linguistic expression is apparent and the attempt is made to construct a *logical* language in which all philosophical propositions could be expressed. In later years this attitude disappears from Wittgenstein's work and in his *Philosophical Investigations*[9] the view is put forward that the proper task of the philosopher is to analyse *ordinary* language and usage and by doing this to understand the meaning of sentences and expressions.

In the nineteen thirties a new philosophical school appeared in England. The members of this school are known as logical positivists. The main English representative was A. J. Ayer.[10] According to the principal tenets of this philosophy the only statements which possessed meaning were analytic (true by definition) statements such as the propositions of logic or mathematics, or empirical (verifiable in sense experience) statements. The second class included scientific statements and common-sense statements (*e.g.*, " the dog is on the mat "). In so far as the propositions of theology, metaphysics and ethics fell into neither of these classes they did not have meaning—in effect they were " nonsensical."[11]

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[7] *Principia Ethica* (1903), p. 9. *The Philosophy of G. E. Moore* (2nd ed., 1952), pp. 581–592.

[8] 1922.

[9] 1953.

[10] *Language, Truth and Logic* (London, 1st ed., 1936, 2nd ed., 1946). For a discussion of logical positivism, see Urmson, *Philosophical Analysis*, Part 2.

[11] In Ayer's view the function of an ethical word is emotive: " Ethical terms do not serve only to express feeling. They are calculated also to arouse feeling, and so to stimulate action. Indeed some of them are used in such a way as to give the sentences in which they occur the effect of commands " (p. 108 (2nd ed.)). For example, the statement " This is good " would be treated as equivalent to " Do this, it's good for you."

In recent years philosophers have refused to accept the drastic exclusion of the latter statements from the field of philosophy. Relying mainly on Wittgenstein's approach to ordinary language, they are examining, among other things, the structure of ordinary statements in ethics and political philosophy. Such statements are considered to be meaningful.

In the field of ethics, one of the leading works is Hare's *Language of Morals*.[12] Hare sets out to examine the structure of sentences which contain words such as " good," " right." He comes to the conclusion that the essential feature of ethical terms is to be found in their commending force: the words perform a *prescriptive* function in language which is to be distinguished from the *descriptive* function which a word such as " red " performs.[13] Hare further asserts that there is no logical connection between the " is " —the factual criteria which the moral word covers—and the " ought "—the moral imperative—of the ethical sentence.[14] This division between " is " and " ought " (which can be traced back to Hume and Kant) is a division between fact and value, and such a view of ethics is called " non-cognitivist."

II

In Hart's " Definition and Theory " the linguistic method is put to work in the analysis of legal concepts.[15] As we have seen, there is an emphasis on ordinary legal usage and the view is expressed that there are no facts in the world of reality to which a legal concept solely refers. Hart makes use of the analogy of a game in examining typical legal sentences such as " A has a right to be paid £10 by B." These sentences assume the existence of a legal system but they do not state that it exists. The function which they perform is " to appeal to rules, to make claims, or give decisions under them ; it is not a statement *about* the rules to the effect that they will be enforced or acted on in a given case nor any other kind of statement about them." [16] Just as Hare in the *Language of Morals* draws attention to the function which is performed by sentences such as " this is good," or " one ought to do this," so too Hart in " Definition and Theory " asserts that legal statements have a " performatory " function. Similarly in Hart's analysis we find the distinction between the " is " and the " ought ":

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[12] Oxford, 1952. Nowell-Smith's *Ethics* (1954) is another important work in the same trend of thought.

[13] *Language of Morals*, p. 91. One can detect here the influence of Moore.

[14] *Ibid.* pp. 46 *et seq.*

[15] 70 L.Q.R. at 42.

> " A paralysed man watching the thief's hand close over his gold watch is properly said to have a right to retain it as against the thief, though he has neither expectation nor power in any ordinary sense of these words. This is possible just because the expression ' a right ' in the case *does not describe* or stand for any expectation, or power or indeed anything else, but has meaning only as part of a sentence the function of which as a whole is to *draw a conclusion of law* from a specific kind of legal rule." [17]

We do not find in Hart's inaugural lecture much discussion or elucidation of the meaning of " law." The lecture is devoted to an analysis of sentences in which legal concepts such as " a right " and " corporation " appear. Now it seems that there is an important distinction between the concept of law or the concept of a legal rule and concepts such as a right or duty. One may say that the former concepts are more basic in that they constitute the essential notions with which the lawyer is faced from the moment he begins his analysis. Before he can begin to understand the subsidiary concepts of a legal system he must know what the meaning of the system as a whole is.

It is only in later articles of Hart's that an attempt is made to define the concept of law.[18] In " Analytical Jurisprudence in Mid-Century " we find a discussion of Austin's analysis of obligation. Austin defined obligation as the chance or likelihood that one, who had been commanded to do or to abstain from doing something, would suffer some evil in the event of disobedience.[19] Hart rejects this definition on the ground that a person may not be under an obligation to perform some act even though a threat is made that some unpleasant consequence will follow.[20] He goes on to describe the functions which a sentence containing the word " obligation " performs. Such a sentence has the task of indicating to a person—

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[16] 70 L.Q.R. at 43.

[17] *Ibid.* My italics.

> " his position in relation to a rule requiring those in situations such as this to act in a specified way. Rules (of this sort) exist when a given social group treats certain types of action (either directly specified or indirectly specified as those designated by a legislative authority) as *standards* of behaviour. This in its turn means: (i) that deviations from certain types of action (unlike deviations from mere habits) are generally criticised as lapses and are accepted as rendering legitimate the use of various types of serious pressure, coercion or punishment (" sanctions ") against those who deviate; (ii) that reference to the general acceptance of the standard is accepted as reason for or justification for demands for compliance even though in any particular case there may be no ' chance ' of the sanction for non-compliance being exacted and no fear of it." [21]

In this particular passage it seems to me that we find an incipient theory of law: a particular socially accepted standard provides the justification for the obligation imposed on the subject of the system. In effect we find here the grains of a sociological theory of law. The justification for a rule in a particular community is not that the legislator wills it but that the particular society adheres to certain standards (which may and invariably nowadays do include obedience to the will of the legislator) which will be treated as binding on the members of that society.

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[18] " Analytical Jurisprudence in Mid-Century: a Reply to Professor Bodenheimer," 105 *University of Pennsylvania Law Review* (1957) p. 953; " Positivism and the Separation of Law and Morals," 71 *Harvard Law Review* (1958) p. 593; " Legal and Moral Obligation " in *Essays in Moral Philosophy* (ed. Melden, 1958), pp. 82–107.

[19] " Province of Jurisprudence Determined," pp. 14–18 (*Library of Ideas*, ed. 1954).

[20] " Analytical Jurisprudence in Mid-Century," *op. cit.*, at 966.

[21] *Ibid.* at 966–967.

In " Positivism and the Separation of Law and Morals," Hart makes some further reflections on this point. He states that the " command " and " habit " elements in the Austinian definition do not fit the fundamental characteristics of legal systems in that the will of the legislator can only be regarded as " legal " if it complies with the fundamental accepted rules specifying the law-making procedures.[22] In effect our analysis must proceed beyond the command and habit notion. " . . . At many points it is apparent that the social acceptance of a rule or standard of authority (even if it is motivated only by fear or superstition or inertia) must be brought into the analysis and cannot itself be reduced to the two simple terms (*sc.* ' command ' and ' habit ')." [23] In this article, one of Hart's main contentions is that the Utilitarians' distinction between law and morals is valuable and should be retained. The recognition that an unjust law is law does not mean that the subject is morally obliged to obey it. In this respect, Gustav Radbruch's alleged failure to distinguish between the two disciplines comes in for criticism.[24]

III

In this section I wish to evaluate Hart's analytic approach. A problem which concerns us here is to what extent usage should be the main concern of the student of jurisprudence. It seems to me that there is definite value in analysing typical legal statements whether they be statements made in court by judges or counsel, or out of court by legal writers and commentators, or by the ordinary citizen. Such analysis certainly gives us knowledge of the meaning attaching to legal terms which are admittedly of a complex nature. However, the assumption which we must make when we are dealing with statements of the kind described above is that we are working within the confines of a particular legal system. We are trying to understand the function of characteristic statements of judges, counsel, commentators and citizens as statements made " within " the legal system.

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[22] " Positivism and the Separation of Law and Morals," *op. cit.*, at 603.
[23] *Ibid.* at 606. See also " Legal and Moral Obligation," *op. cit.*, at 88 *et seq.*
[24] " Positivism and the Separation of Law and Morals," *op. cit.*, at 615–621.

To take an example. Let us say that under the traffic code of a particular state a motorist has the duty of keeping to the left of the road, of stopping at intersections, of driving at a reasonable speed, etc. This concept of duty may be examined from different points of view. A sentence containing the words " has a duty to obey the traffic code " may be uttered or stated by a number of people including a magistrate giving a decision in respect of an infringement, an advocate who is appearing for the state, a news reporter summarising the case, or an ordinary citizen reading the report. As uttered by the magistrate it is a *decision* in relation to the traffic code, by the advocate an *appeal* to the code, by the reporter a *description* of the code as applied in the court, by the citizen a *reflection* on the code as applied in the court.[25]

However, there may come a time when we must step outside the legal system, as it were. The example here which comes to mind is the case of the honest citizen of Germany in the Nazi period faced with a statute ordering him to report any remark detrimental to the state. We can imagine such a citizen saying to himself: " Am I *really* obliged to obey this rule? " In such a sentence we can detect an appeal to a standard outside the legal system itself. The questioner is in effect doubting whether the rule is obligatory. Even if he is told by a police official or a judge that he is under a duty to obey it, he still may persist with the question " Am I *really* obliged to? " It is at this stage that judgment must be passed on the rule of the system and even sometimes on the whole system.

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[25] Or on a particular rule of the code.

In such a case it seems to me that Hart's conception of legal obligation is not sufficient. In truth it goes beyond the definition of Austin. It is an advance in that it regards social acceptance of the rule or system as more basic. But it seems to me that one must look beyond the social community, in which the standard is applicable, to criteria of judgment based on a universal foundation such as the standards of civilised men. For we must recognise that a particular community may accept certain rules or a legal system either of which may be basically of a tyrannical nature.[26] It is submitted then that obligation in the most complete sense of the term must rest on a universal or " supra-group " foundation.

It may be objected that Hart has in mind only the obligation imposed by positive law and stands with the Utilitarians in recognising that a person may be morally entitled to disregard a flagrantly unjust rule[27] which has somehow got itself accepted by the social group.[28] Elsewhere,[29] I have spoken of the difficulty involved in asserting a dual obligation—an obligation to obey rules of positive law and an obligation to obey rules of morality—where the two systems are in conflict. I will not enlarge on this discussion except to state that the word " obligation " connotes moral impulsion: an obligation to obey the law cannot rest on the law itself.

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[26] It has been suggested that a distinction is to be drawn between a totally unjust legal system and a totally unjust rule of a legal system: obedience to the former is unjustified but required in the case of the latter. But there does not seem to me to be a qualitative distinction here. A number of the rules of the Nazi legal system were just and obedience to them was justified. It is indeed difficult to imagine a system in which *every* rule is unjust. However, on the other hand, one may say that where the number of unjust rules is great the whole system is tainted, with the consequence that not only is there a right of disobeying particular rules but the right of revolting against the upholder of the system. See Duguit, *Traité de droit constitutionnel*, Tome 3 (1930), pp. 790–806.

[27] A distinction is to be drawn between a flagrantly unjust rule and a rule which *seems* to be unjust. If the rule merely seems to be unjust, then the citizen ought to obey because the presumption is always in favour of the validity of the rule. *Cf.* Austin, *Province of Jurisprudence Determined* (*Library of Ideas*, ed. 1954), p. 186.

[28] In " Legal and Moral Obligation," *op. cit.*, at 101, 105–107, Hart recognises that the word " obligation " may be extended to include moral principles by which adherence to or departures from the accepted morality of social groups may be " criticised." However, he does not accept the proposition that such moral principles are superior in the sense that the " obligatoriness " of the legal system is based on them.

[29] " Natural Law and Legal Positivism," 11 *Journal of Legal Education* (1959), p. 503, esp. p. 509.

While we may recognise a distinction between law and morals [30] for the purpose of *preliminary* analysis, a *complete* analysis must take account of the relationship which exists between the two disciplines. A doctrine of positivism which stops short at the standards accepted by a social group (although it may suffice when we are dealing with legal systems embodying moral as distinct from immoral rules) must be supplemented by a doctrine which attempts to show the relationship between law and morality. The natural law doctrine seems to perform this task.

However, an objection which is raised against the natural law doctrine is that it confuses two questions: " law as it is " and " law as it ought to be ", and therefore is doomed to failure in so far as there is implicit in it a preconceived belief that law and morality are necessarily related.

To this argument, the natural lawyer might reply that his method of approach to the question of the definition of law is as valid as any other which initially defines the sphere of inquiry of the legal theorist, whether that sphere be the legal concepts of the analytical jurist, the *Volksgeist* of the historical jurist, or the judicial decisions of the realist. In these cases, it might be said, the person defining law does so from a certain picture or field of vision which attaches itself to one or other of these features.[31]

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[30] It may be pointed out that within morality itself one must make a distinction between those rules dealing with duties to one's neighbour (abstaining from injury, fulfilling promises) and those rules relating to the personal life of the individual (rules ordaining kindness, courage, etc.). The former in so far as they relate to the social life ought to be sanctioned by the state.

[31] It may be that we find some analogy in the differentiation of functions in science —the theoretical scientist and the practical scientist study the subject-matter of science in different ways—or in the field of medicine—both the physiologist and the doctor are concerned with the human body, the former with its structure, the latter with its care and preservation. In the same way in the field of political inquiry, the task of the political scientist is to examine the structure of the

At this stage, however, the problem might reach a deadlock with the natural lawyer, the analytical jurist, the historical jurist, and the realist all exclaiming: " Well, this is the way I *see* law and therefore this is the way in which I intend to define it." If this happens it would seem that one could go no further, that the question of definition depends on the personal attitude of the jurist in question.[32]

It seems to me, however, that the question cannot rest here: that the problem of definition is not at all dependent on the subjective attitude of the definer, unless of course we have in mind stipulative definition, where the definer intends to give a particular meaning to a word for his own purposes. When I say that the problem of the definition of law is not dependent on the subjective attitude of the definer I mean that his point of view is not his own creation or something which has occurred to him out of the blue, as it were. He usually represents some school of thought or legal tradition which may stretch over a great number of years. The analytical jurist, for instance, may have formed his ideas on the basis of the tradition which stretches from Austin to the present day, while the natural lawyer may refer his approach to the works of certain modern natural lawyers, or even to ancient sources. To this extent, the " stop-sign " which Glanville Williams erects is likely to misrepresent the objectivity which attaches to the positions adopted by the natural lawyer or the analytical jurist.

In an article published more than twenty years ago,[33] Professor Oakeshott is particularly concerned with the question of different approaches to the definition of law. His thesis seems to be that the sphere of juristic inquiry is not exhausted merely by one approach, that indeed concentration on one alone is insufficient. The natural lawyer by

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political system, while that of the political philosopher is to examine the purposes which it fulfils and the grounds of political obligation. In all such cases, the fields of inquiry may be separated for practical purposes, but they cannot be entirely divorced from each other. The applied scientist who knows no theory is likely to be ineffective in his work.

[32] This seems to be the view of Glanville Williams: " The Controversy Concerning the Word 'Law,' " in *Philosophy, Politics, Society* (ed. Laslett, 1956), p. 134.

[33] " The Concept of a Philosophical Jurisprudence," 3 *Politica* (1938), pp. 203, 345.

concentrating on the " point of intersection " between law and ethics may neglect the analysis of legal concepts, while the analytical jurist, by concentrating on the latter, may neglect the former field of study. The solution which Oakeshott offers is not to lump all the theories together, to create some type of hotch-potch of legal theories, as this is artificial, but to concentrate on a particular tradition or way of thinking in a manner which will lead the jurist to inquire into the sufficiency of that tradition and thereby to become acquainted with other traditions.[34] In other words, the problem of different approaches to law is not solved from the *outside*, by rejecting all the traditions and at the same time constructing some type of universal theory of law which takes in something from each, but from the *inside* by starting with one tradition and examining its tenets in the light of other traditions.

Now it is a striking fact that a writer who adheres to the analytical or natural law tradition does not completely attach himself to the method of approach characteristic of his tradition, but makes some concession at least to other traditions. Austin's work, for instance, is not devoted entirely to a study of " law as it is." He devotes three chapters to a discussion of utility, thereby recognising that morality is within the sphere of a juristic inquiry (although not part of the science of law),[35] while his attempt to argue for the recognition of certain principles bottomed on the nature of man is said by some to point to an incipient natural law theory.[36] With the natural lawyers, it is obvious that discussion is not confined entirely to the question of the relationship between law and morality, for they do indeed recognise the importance of analysing legal concepts.[37]

This does suggest that, while a member of a particular school approaches the question of the definition of law in a particular way, he is nevertheless prepared to recognise that other questions may be asked about law, and this is not negatived by the fact that such questions are confined to another science, as in the case of Austin, to "deontology."[38] Even Kelsen, the exponent of the pure theory of law, does not completely succeed in excluding ethical notions from the sphere of law.[39]

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[34] *Ibid.* pp. 352 *et seq.*

[35] Lectures 2, 3, 4 of the " Province of Jurisprudence Determined" (*Library of Ideas*, ed. 1954).

[36] *Ibid.* Introduction, XV.

[37] See, for example, Geny, *Science et technique en droit privé positif* (1921–30).

The basic difference between the analytical jurist and the natural lawyer seems to be this. Both set out to analyse the notion of law. The former, in giving an answer to the question "what is law?" finds that there is *no* necessary connection between law and morals. The latter, in answering the same question, finds that there *is* a necessary connection. In this way, the existence of the two traditions with their respective methods of inquiry can be explained. The analytical jurist, having arrived at his conclusion, naturally considers it important to analyse the basic notions of law (such as "right," "duty," "personality").[40] The natural lawyer, arriving at his conclusion, considers it to be of primary importance to study the "point of intersection" between law and morality (*e.g.*, the notion of the common good).

The natural lawyer's conclusion does suggest that the concept of a legal system or of legal rules is not limited to a mere recognition of formal sources. In his view, the boundaries of law are not something, as it were, which can be photographed and the negative developed, whereupon the jurist may then get to work in pointing out the contours and shapes which appear thereon. The dimensions in the natural law picture are more profound. Taking the analogy further, the natural lawyer might say that one picture alone is insufficient to explain the object which appears in the photograph, for that one picture, while stating something, also omits to state something. In other words, the preliminary picture must be fitted into a wider context.

R. D. LUMB.

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[38] *Cf.* Wollheim, "The Nature of Law," *Political Studies*, Vol. 2 (1954), p. 128 at 139.

[39] The recognition of the Grundnorm as a mere "postulate" of legal thought does not overcome the problem.

[40] See Hart, "Analytical Jurisprudence in Mid-Century: a Reply to Professor Bodenheimer," *op. cit.*, at 973–974.

CASES AND COMMENT

1. SCOTTISH CASES

JUSTICIARY—
evidence—
admissibility of
statement.

In *McAdam* v. *H.M. Advocate*, 1960 S.L.T. 47, McAdam had assaulted and stabbed a woman and thrown her into an ashpit. He was shortly thereafter arrested, cautioned and charged with assault to severe injury. He made a statement in answer to this charge. Subsequently he was charged on indictment with assault and attempt to murder. The question arose whether the panel's statement, made to the police in reply to the lesser charge, was admissible in evidence at his trial on the more serious charge of attempted murder. In the converse case, it was pointed out by the High Court, no difficulty would have arisen: *Willis* v. *H.M. Advocate*, 1941 J.C. 1 S.L.T. 131; nor could the statement's admissibility be limited to cases where the indictment eventually served was identical with the charge originally made against the accused. The Lord Justice-General, with the concurrence of his brethren, said that, apart from the general criterion of fairness to the accused, evidence of the accused's reply was admissible only if the crime charged on each of the two occasions fell into a single category, such as personal violence or dishonesty, and, more importantly, if the charge and indictment both covered substantially the same *species facti*. (This latter test leaves room for argument on the facts of particular cases.) Accordingly, in the view of the High Court, evidence of the accused's statement is admissible both where he s subsequently charged with a lesser, and with a greater, crime; it was accordingly admissible, and had been rightly admitted at the trial, in this case.

The Lord Justice-General remarked that this principle would accordingly apply where the original charge was of assault and the indictment charged aggravated assault or culpable homicide *or even non-capital murder (which is essentially now a form of aggravated assault)*, whereas capital murder cases might be in a different position, and as to these he reserved his opinion. This statement seems to conceal a fundamental misconception.

Murder, both capital and non-capital, is surely quite a different crime from any kind of assault, being distinguished by its *mens rea*, namely deliberate intent to kill or, at very least, such gross and wicked indifference to the probable consequences of conduct as to be almost indistinguishable from deliberate killing. This *mens rea* is quite different from the *mens rea* of assault, and of culpable homicide. Moreover, *mens rea* is the same for both capital and non-capital murder and the only point in that distinction is that murder committed in certain defined circumstances is capital, and in all other circumstances is non-capital; the difference is in the penalty, not in the nature and quality of the acts nor in the *mens rea*. It seems fundamentally wrong to treat capital murder as murder and non-capital murder as a form of aggravated assault. They are both murder for all purposes except punishment. Admittedly in capital murder cases, by reason of the seriousness of the penalty, particular care must be taken on all matters which relate to the fairness of the trial, but it is very wrong to treat capital murder in a special category and degrade non-capital murder (which includes, be it remembered, poisoning, gassing, starving and other instances of calculated, premeditated killing, such as *H.M. Advocate* v. *Kidd*, 1960 S.L.T. 82—killing by asphyxiation with chloroform) into merely aggravated assault, the *mens rea* of which does not contemplate death at all.

D. M. W.

JUSTICIARY—judge's charge—onus of proof.

McKenzie v. *H.M. Advocate*, 1960 S.L.T. 41 says nothing new but is a useful modern instance of the kind of fundamental point which is seldom challenged but for which express authority is sometimes hard to find. A judge of the High Court, presiding at the trial of a lorry driver for causing death by reckless driving (Road Traffic Act, 1956, s. 8 (1)), failed to direct the jury as to the onus of proof on the Crown. The High Court quashed the conviction and substituted a verdict of guilty of the alternative charge of being drunk while in charge of a vehicle. The Lord Justice-Clerk, delivering the opinion of the court, accepted that failure to direct the jury on this issue was fundamental, a non-direction which amounted to misdirection. He also reaffirmed that the presumption of innocence was a fundamental tenet of our criminal procedure, that it must be displaced by the Crown, and the standard by which the burden fell to be discharged was "the establishing of the guilt of the accused beyond reasonable doubt." The emphasis and elaboration required in the judge's charge to the jury depended on the circumstances of the case and on whether the evidence was overwhelming or narrow, but the bare minimum was to tell the jury that it was for the Crown to prove the guilt of the accused beyond reasonable doubt.

English experience suggests that it may be wise for a judge not to try to go very far in explaining what "reasonable doubt" is, as it is very difficult to do so without introducing confusion, or citing examples which are not wholly apt, or quoting synonyms which are not truly synonymous.

D. M. W.

JUSTICIARY—murder—special defence of insanity.

The controversy which has raged for years over the McNaghten Rules in England has hardly touched Scotland, Scots law having evaded the problem hitherto, because in nearly all cases the panel has pleaded insanity in bar of trial and has been dealt with, without the issue ever going to the jury of whether he was insane at the time of the alleged crime to such an extent as to be exempt from legal responsibility for committing it. Indeed, Lord Cooper's evidence before the Royal Commission on Capital Punishment was distinctly vague as to what the Scottish standard of insanity was. Now the issue has arisen squarely in *H.M. Advocate* v. *Kidd*, 1960 S.L.T. 82, where Kidd, charged with murdering his wife and daughter by asphyxiating them with chloroform, lodged a special defence of insanity at the time of the alleged crime. Lord Strachan's charge to the jury is therefore of great interest and legal importance. It is a notably lucid charge, putting the issues to the jury clearly and in logical order. On the issue of insanity, his Lordship directed the jury that the accused was presumed to be sane unless he proved the contrary, that it was for him to prove his insanity, but that the onus of proof was only to satisfy the jury on a balance of probabilities. As to insanity, his Lordship told the jury that they must treat the matter broadly: "There must have been an alienation of the reason in relation to the act committed. There must have been some mental defect, to use a broad neutral word, some mental defect, by which his reason was overpowered, and he was thereby rendered incapable of exerting his reason to control his conduct and reactions."

While there was no express mention of the McNaghten Rules, Lord Strachan does indirectly advert to them, but says that "that test has not been followed in Scotland in the most recent cases," and he summed up this part of the charge by saying that the question was "whether the accused was at the time of sound or unsound mind." This is very much the common-sense test which Lord Cooper thought was a jury's natural approach to such an issue. The charge went on to consider the possibility of diminished responsibility. In the result the jury found the accused guilty of culpable homicide on both charges, indicating that they found that he had committed these crimes while in the mental state of diminished responsibility, and he was sentenced to fifteen years' imprisonment. This charge is of great interest and importance and is certainly a model of clarity and reason. On the crucial point it is noteworthy that the McNaghten test is rejected and the common-sense test of "sound or unsound mind" substituted.

D. M. W.

REPARATION—joint delinquents.

An interesting division of judicial opinion was apparent in *National Coal Board* v. *Thomson*, 1960 S.L.T. 89, where the Second Division by three to one reversed the Lord Ordinary. The facts were that the National Coal Board owned a van which ran into the back of Thomson's lorry; G., a passenger in the National Coal Board van, was injured and claimed damages from the National Coal Board. The National Coal Board settled the claim by G. and sued Thomson for one-half of the amount of the settlement, and for one-half of the amount of the damage to their van, the National Coal Board alleging in their pleadings that the accident was caused equally by the fault of both drivers. They later amended their pleadings to aver that they sued as G.'s assignees, so far as concerned the personal injury damages.

Thomson's first contention was that the National Coal Board, having settled G.'s claim without any decree or admission of liability, had made a voluntary payment and could not claim relief therefor against an alleged joint delinquent. The Lord Ordinary took the view that a decree affirming the National Coal Board's liability to G. was not a prerequisite of an action of relief at common law, though it would be for the statutory contribution (Law Reform (Miscellaneous Provisions) (Scotland) Act, 1940, s. 3 (2)).

In the Second Division it was pointed out that constitution was necessary to fix the amount, and a proper amount, for the damages; a settlement might be unreasonably generous. In other cases, such as *Palmer* v. *Wick, etc., S.S. Co.* (1894) 21 R. (H.L.) 39; 2 S.L.T. 91, a joint and several decree had been obtained, or as in *Glasgow Corporation* v. *Turnbull*, 1932 S.L.T. 457, decree had been obtained against one wrongdoer, who thereupon sought relief from another, alleged to be also partly to blame. In such cases the extent of liability had been fixed; here it had not, save by agreement between the National Coal Board and G. which, although known to Thomson, was *res inter alios* to him. The pursuers' case was not helped by anything in the 1940 Act and was consequently irrelevant, except in so far as it claimed a share of the damage to the pursuers' van.

It was further pointed out, particularly by Lord Patrick, that the action was one of relief by the National Coal Board and that it did not require the assignation of G.'s claim, and indeed was not helped by it, since the action was not for damages for his injuries (he having received settlement of his claim), but purely for relief. Lord Mackintosh was further of the view that, in any event, the assignation was time-barred by the Law Reform (Limitation of Actions) Act, 1954.

Lord Strachan dissented, taking the view that at common law one wrongdoer was liable to another who paid on the basis of recompense, irrespective of whether the liability had been constituted by action or not, and he points very cogently to cases where no prior action of constitution would have been in court.

The Lord Justice-Clerk observed, *obiter*, that in such a case as this, third-party procedure would be of benefit, whereby not merely the pursuer, but a defender, might call a second defender into the process and thereby have all parties before the court. Third-party procedure used to be competent in Scotland and it seems that it might, with advantage, be restored.

This case is of great importance and clarifies an important issue of the right to relief at common law and the majority view seems the right one: one person cannot be prejudiced by a settlement effected by another and made to pay a half-share thereof. The liability to the injured person must be constituted and the second party's share of that liability fixed by the court, not thrust on him by the first party, who may have been generous or even unreasonable in his settlement and who may have been far more than half to blame. The topic of relief is not much illustrated by authority and not in every respect clear and this decision explored with scholarly care an area hitherto unopened.

D. M. W.

REPARATION—negligence—onus of proof.

The House of Lords, in *Brown* v. *Rolls-Royce, Ltd.*, 1960 S.L.T. 119 made two observations of interest: first, that the onus is on the pursuer to prove negligence, not on the defenders to disprove it (the matter in issue being the efficacy of barrier cream against industrial dermatitis); and second, that Lord Dunedin's well-known proposition in *Morton* v. *Dixon*, 1909 S.C. 807, 809; 1 S.L.T. 346 (about failure to follow common practice) was not a proposition of law, but only a prima facie guide. "The ultimate test is lack of reasonable care for the safety of the workman in all the circumstances of the case." Failure to comply with common practice, as Lord Denning put it, raises a prima facie case, in that it is evidence from which negligence may be inferred, but it is no more. These points are in accordance with recent pronouncements of the House in English appeals *in pari materia*.

D. M. W.

A comment unrelated to a specific case is that the Stair Society edition of Baron Hume's *Lectures on Scots Law* seems to be becoming a regular authority. The lectures were cited and discussed from the Bench in *National Coal Board* v. *Thomson* (*supra*) and again in argument in *Bell* v. *Blackwood, Morton and Sons, Ltd.*, 1960 S.L.T. 145. While the warnings issued from the Bench about the authority of the *Lectures* must always be kept in mind, it appears that this publication of the Society, much criticised at the time for its length, is proving of more than merely historical interest.

It is settled law in Scotland that the refusal to have sexual relations is not *per se* a ground for matrimonial relief but may be if the refusal can be shown to amount to cruelty, in the same way as physical harm or mental torture. The specialty in *Scott* v. *Scott*, 1960 S.L.T. 153, was that the refusal was not wilful but merely a result of misfortune, the husband being impotent *ab initio*. In these circumstances the Lord Ordinary and the Second Division were all of the view that the refusal did not constitute cruelty. As Lord Patrick neatly put it: "It would be a misuse of language to describe the husband's failure to have sexual intercourse with his wife as 'cruelty,' he being unable to perform the act, had he the best will in the world." The appropriate remedy was clearly a declarator of nullity of marriage on the ground of the husband's impotence. But clearly, provided that the marriage has been consummated, the wilful refusal of sexual relations may amount to cruelty if the other requisites for relief on that ground are satisfied. Non-intercourse because of impotence, even if it does hurt the other party, is not cruelty. The decision is manifestly right and illustrates again the interaction of remedies in this branch of the law and the importance of choosing between divorce and nullity or petition for dissolution, according to the precise circumstances.

HUSBAND AND WIFE— divorce—cruelty —refusal of sexual relations.

D. M. W.

2. ENGLISH CASES

Quintas v. *National Smelting Co., Ltd.* [1960] 1 W.L.R. 217 contains interesting observations on the extent of the duty to fence dangerous machinery in terms of section 14 (1) of the Factories Act, 1937, a duty which is frequently founded upon in civil actions for damages. In this case a small gap had been cut in the existing fence to enable equipment to be moved through it. Subsequently a workman walked through the gap to signal to his foreman when he was struck by a bucket suspended from a ropeway and injured. In deciding that his employers were liable, Devlin J. adopted the dicta of Lord Porter in *Carroll* v. *Andrew Barclay & Sons, Ltd.*, 1948 S.C.(H.L.) 100; 1948 S.L.T. 464; [1948] A.C. 477, namely, that "fencing, in my opinion, means the

FACTORIES ACT, 1937, s. 14 (1)— Extent of obligation to fence.

erection of a barricade to prevent any employee from making contact with the machine," and of Lord Morton in *John Summers* v. *Frost* [1955] A.C. 740, where his lordship said " there must be complete protection against contact . . ." but added " I do not suggest that the fence must be so constructed that it cannot be climbed over, or broken down, by an employee who is determined to get at the machinery." Devlin J. concluded that the fence must not merely guard against accident, but must be such as takes into account human weaknesses, which include, as well as forgetfulness and inadvertence, an inclination sometimes to run minor risks and to take short cuts. Some degree of recklessness (as well as carelessness) had to be foreseen. The fence, however, need not be constructed so as to keep out a determined man, but should be such as would deter a man who, in pursuit of a short cut, was willing to run a minor risk. In this case the fence did not fulfil the latter requirement.

W. A. E.

DIVORCE—Polygamous marriage—Subsequent marriage in England.

In *Ohochuku* v. *Ohochuku* [1960] 1 All E.R. 253, two domiciled Nigerians, who were, however, Christians, went through a form of marriage in Nigeria which was potentially polygamous, although they did not intend to make it so. They were subsequently married in London according to English law in order to obtain a marriage certificate as a practical convenience in England. Founding jurisdiction on her three-year period of residence the wife subsequently petitioned the court for divorce on the ground of her husband's cruelty. The court held that it could not dissolve the Nigerian marriage, which was potentially polygamous. Decree of divorce was, however, granted in respect of the subsequent marriage in England.

W. A. E.

AMENDMENTS

Of all the ridiculous cases ever reported, *Re Langton, decd.* [1960] 1 W.L.R. 246 must surely take the palm. It was conducted by the plaintiff in person, who came up against the intransigence of court officers in charge of processes when he lodged an amended statement of claim printed in black instead of red ink, which they contended was the proper form. He stood his ground when ordered to reprint in red, whereupon the registrar and a judge in chambers both dismissed the action for want of prosecution. It took the Court of Appeal to decide that there was no legal obligation on the plaintiff to have his amendment printed in a certain colour.

W. A. E.

HUSBAND AND WIFE —Cruelty— Effeminacy of husband.

In *Bohnel* v. *Bohnel* [1960] 1 W.L.R. 590 a wife petitioned the court for divorce on the ground of her husband's cruelty, in that he constantly desired and displayed his desire to dress and behave like a woman. This behaviour caused injury to the wife's health. The husband went to see a psychiatrist who advised treatment which would not, however, have remedied the lack of sexual desire which the husband manifested in his wife, but would in fact have decreased it. The husband did not undergo the suggested treatment. In dismissing the petition, the Court of Appeal held that in view of the husband's efforts to conceal his tendencies and activities from his wife, it was impossible to impute to him, or to infer from his conduct, any intention to injure her; nor was it possible to say that he had deliberately pursued a course of conduct which he must have realised would be likely to cause her injury. Moreover, as any possible treatment would not have effected a cure of his marital difficulties, his failure to undergo treatment was not unreasonable.

W. A. E.

DISABLEMENT GRATUITY— Amount to be deducted from damages awarded —Law Reform (Personal Injuries) Act, 1948, s. 2 (1).

Hultquist v. *Universal Pattern and Precision Engineering Co., Ltd.* [1960] 2 W.L.R. 886 has settled a conflict of judicial authority by overruling *Roberts* v. *Naylor Bros., Ltd.* [1959] 1 W.L.R. 718, and approving *Perez* v. *C. A. V., Ltd.* [1959] 1 W.L.R 724. As the only Scottish decision on this question, *Carson* v. *Joy Sullivan* (February 9, 1960, unreported), followed *Roberts* it may also now be regarded as overruled. *Hultquist* has now decided that when an injured person receives a disablement gratuity for life, that portion which the court should take into account under section 2 (1) of the Law Reform (Personal Injuries) Act, 1948, as " the value of any rights which have accrued or probably will accrue to (the injured person) therefrom in respect of industrial injury benefit . . . for the five years beginning with the time when the cause of action occurred," is one-half of such proportion of the gratuity as the five-year period (or the unexpired portion of that period) bore to the injured person's expectation of life, or to any lesser period specified for the duration of the gratuity. Upjohn L.J. observed that section 2 (1) does not require any exact calculation to be made, and where evidence was lacking the court would make a rough and ready assessment of the proper proportion of the gratuity to be taken into account. In Hultquist the agreed expectation of life was thirty-five years, and the deduction from the gratuity of £210 was therefore one-half of £30.

W. A. E.

RIGHT TO JURY TRIAL —Civil action for damages.

The case of *Pease* v. *George* [1960] 1 W.L.R. 427 may be of interest to Scots lawyers for comparison with our own law giving a right to jury trial in the enumerated causes unless special cause be shown. Under R.S.C., Ord. 36, r. 1, of the English courts "(1) In every action commenced by writ of summons, an order made on the summons for directions shall determine the place and mode of the trial, and, where the trial is to be before a judge, shall determine whether the trial is to be with or without a jury; . . . (3) Save as provided by Rules 2 and 3 of this order, the discretion of the court or judge in making or varying any order under this Rule is an absolute one." In *Pease* a plaintiff sought to have a very serious action for damages tried by a jury but the master refused the application. The Court of Appeal held that they were not empowered to interfere with the exercise of that discretion.

W. A. E.

3. PRIVY COUNCIL CASES

SALE OF GOODS: Construction of exceptions clause.

Hong Guan & Co., Ltd. v. *R. Jumabhoy and Sons, Ltd.* ([1960] 2 W.L.R. 754) was an appeal against a judgment of the Court of Appeal of the High Court of the Colony of Singapore dismissing, by a majority, the present appellants' appeal from the judgment of the trial judge. The appellants (the plaintiffs) brought an action claiming damages for breach of contract of sale. It was their practice to buy goods in bulk and to make sub-contracts of sale, also in bulk. The respondents were importers of cloves into Singapore. In November 1950 the respondents contracted to sell to the appellants 50 tons Zanzibar cloves, second grade, December shipment. The contract was "subject to *force majeure* and shipment." The respondents, in December, shipped a quantity of cloves which was sufficient to fulfil their contract with the appellants, but not enough to meet all their obligations to their other buyers. The cloves were allocated to the latter and the appellants received none. In December 1950 they received a letter informing them that "Your shipment was not effected by the Zanzibar suppliers. Your contract was made subject to *force majeure* and shipment in consequence of which please consider your contract as cancelled." On November 24, 1950, the appellants had entered into two contracts of sale each for 25 tons of Zanzibar second grade cloves, and thereafter the appellants paid compensation to the two firms with whom those contracts had been made. The appellants claimed against the respondents damages for breach of contract of sale. The respondents contended "that the contract was made subject to *force majeure* and shipment and that no shipment of the goods contracted to be sold took place."

The Board stated that there was a double-barrelled condition in which there was a juxtaposition of "*force majeure*" and of "shipment," and that, having regard to that consideration, the clause in the contract should be construed as meaning that the contract was: (a) conditional on the sellers not being prevented by circumstances amounting to *force majeure* from carrying it out; and (b) conditional on the sellers being able to procure the shipment in December 1950 of cloves of the quantity and description referred to in the contract. So far as the clause dealt with *force majeure* it appeared designed to protect the respondents from liability if they were prevented from performing the contract by circumstances beyond their control, and, to be in consonance with that, the second branch of the condition was to be construed as being designed to protect them if prevented from carrying out the contract from inability to procure the shipment. If the words were to be construed as covering a situation when shipment did not take place merely as the result of the arbitrary choice of the vendor, then there would be no contractual force in the document, which would merely give an option to the vendor. There were no words in the present contract which enabled the respondents to excuse their failure to deliver by reference to their other commitments. The respondents argued that the contract was only binding in the double event of the sellers in fact shipping cloves and allocating a sufficiency of the cloves shipped to this particular contract. The undisputed facts showed that the respondents were able to ship and did in fact in December 1950 ship cloves to the quantity and of the description set out in the contract of November 1950. The shipment by the respondents showed that shipment of the goods contracted to be supplied was not prevented by circumstances beyond their control. The respondents did not bring themselves within the excusing provision of the clause. When they failed to deliver to the appellants the cloves contracted for, and when they purported to cancel the contract, they committed a breach of contract for which they became liable in damages to the appellants. The correct measure of damages was the difference between the contract price and the market price at or about the date when the cloves arrived in Singapore. The appeal was accordingly allowed and judgment entered for the appellants.

Hollis Bros. & Co., Ltd. v. *White Sea Timber Trust, Ltd.* ([1936] 3 All E.R. 895); *Star Public Saw Mill Co.* v. *Robert Bruce & Co., Ltd.* ((1923) 17 Ll.L.Rep. 7) and *Kokusai Kisen Kabushiki Kaisha* v. *Johnson* ((1921) 8 Ll.L.Rep. 434) considered.

Inquiry under Dentists Act, 1957.

Dudley Ernest Lyncoln Wages Felix v. *General Dental Council* ([1960] 2 W.L.R. 934) was an appeal under section 29 of the Dentists Act, 1957, from a determination of the Disciplinary Committee of the General Dental Council, made on November 12, 1959, under sections 25 and 26 of the same Act, that the appellant had been guilty of infamous or disgraceful conduct in a professional respect, and that his name be erased from the register. The determination under appeal was the outcome of an inquiry held by the Disciplinary Committee on November 11 and 12, 1959, with respect to the following charge against the appellant: That being a registered dentist: (1) having accepted a named person in or about February 1958 as a patient under the National Health Service (General Dental Services) Regulations, he wrongfully claimed for three fillings which had not been done; (2) with regard to another patient accepted on or about April 1958 he wrongfully claimed fees for two fillings when only one filling had been done; (3) in respect of a third patient accepted in or about April 1958 he (i) wrongfully certified that sixteen fillings were required to render the patient dentally fit, when in fact thirteen of those fillings were unnecessary; (ii) wrongfully claimed fees for four fillings when only three fillings had been done. In the course of the inquiry paragraph (2) was amended by inserting the words " in one tooth " between the words " two fillings " and " when only." The Disciplinary Committee found: (a) that the facts alleged against the appellant in each paragraph of the charge had been proved; (b) that as regards paragraph (1) and paragraph (3) (i) and (ii) the appellant had, in relation to the facts proved, been guilty of infamous or disgraceful conduct in a professional respect; but (c) that as regards paragraph (2) of the charge the appellant had not, in relation to the facts proved, been guilty of such conduct. On those findings the Disciplinary Committee directed the name of the appellant to be erased from the register.

The Board stated that the Disciplinary Committee accepted the appellant's explanation of the charge in paragraph (2) as affording sufficient ground for acquitting him of infamous or disgraceful conduct in that case, and accordingly that part of the charge must not be held against him in the present appeal. With regard to paragraph (2), the claim was made in respect of two fillings in one tooth, and the appellant explained in his evidence that the treatment in that instance began with two cavities which merged into one in the course of his operations, and that the need for a corresponding alteration in the certifying form was overlooked. The Board, having referred to the three cases, said that those three cases, now reduced to two by the Disciplinary Committee's findings with regard to paragraph (2), might be conveniently referred to as the cases of overcharging. The appellant's defence concerning them was to the effect that, while he admitted the fact of overcharging, he denied that it was done with any fraudulent or dishonest intent, or with a view to obtaining remuneration to which he was not entitled. He attributed the mistakes admittedly made to carelessness on his own part and on that of his receptionist, to whom he had entrusted the keeping of his records of the treatment carried out for the patients concerned, without adequate checking or supervision. With regard to the treatment alleged to have been wrongfully certified as necessary, the appellant's evidence was that he honestly believed it to be necessary, and the evidence of dentists called for the respondent council, though disagreeing with the appellant, admitted that the matter was one of opinion, and certainly did not say that no dentist could honestly be of the opinion which the appellant expressed.

The Board said that the appeal was by way of rehearing, to which the same principles applied as were applicable to an appeal to the Court of Appeal against the decision of a judge of the High Court sitting as a judge of fact at first instance. Thus, in the present case a finding by the Disciplinary Committee that the appellant claimed fees for work which had not been done, and as to the circumstances in which he did so, would be a finding of specific facts which the appellant tribunal should prima facie accept; whereas a finding that on the specific facts so found the appellant was in relation to the matter in question guilty of infamous or disgraceful conduct in a professional respect would be in the nature of an inference from the specific facts found, and as such more readily open to review. The question whether, in relation to a given matter, a dentist had been guilty of infamous or disgraceful conduct was, in their opinion, a question of mixed fact and law, the question of law being whether, on the facts proved or admitted, the dentist had been guilty of infamous or disgraceful conduct within the meaning of section 25 of the Act of 1957. The Board were put in some difficulty by the circumstance that, beyond finding the facts alleged in each paragraph proved, the Disciplinary Committee gave no reasons for its determination. The Board were thus left without any express guidance as to the view of the facts on which the Disciplinary Committee proceeded.

They had also found some difficulty with regard to the precise meaning and effect of the adverb "wrongfully," which appeared in each paragraph of the charge. It might thus be argued that, in finding the facts alleged in each paragraph of the charge proved, the Disciplinary Committee had found that in each case the act complained of was not only done but was "wrongfully" done, and that that, without more, would suffice to convict the appellant of infamous or disgraceful conduct. The word " wrongfully " was, however, of wide and uncertain import. It could be regarded as adding nothing to the acts complained of, which were plainly wrongful in the sense that the appellant ought not to have done them. On the other hand, it might be regarded as imputing an unspecified degree of culpability of an undefined character ranging from mere carelessness to fraud or dishonesty. It clearly could not be held that every act which could be characterised as " wrongful " in one sense or another was infamous or disgraceful. The Disciplinary Committee clearly recognised that in the case under paragraph (2). The solution was to be found in paragraph 10 (2) of the General Dental Council Disciplinary Committee (Procedure) Rules, 1957 (S.I. 1957, No. 1265) : " Where in a case relating to conduct the Committee have found that the facts or any of them alleged in any charge have been proved to their satisfaction (and have not on those facts recorded a finding of not guilty) "—as they did in the case under paragraph (2)—" the Committee shall forthwith consider and determine whether in relation to the facts found proved as aforesaid the respondent is guilty of infamous or disgraceful conduct in a professional respect. . . ." That showed that the inquiry was to be carried out in two stages, the first directed to finding whether the primary or specific matters of fact alleged, including any facts bearing on the question of culpability or " wrongfulness," had been proved, and the second to determining whether on the facts so found the respondent had been guilty of infamous or disgraceful conduct.

In the opinion of the Board the matter fell to be judged by reference to the evidence as a whole, including the appellant's explanation of the way in which the overcharging arose. It further appeared to their Lordships that, as the findings of the Disciplinary Committee on the cases of overcharging contained nothing to indicate that it did not accept the appellant's evidence as true, and as the solicitor in conducting the council's case did not challenge the truth of the appellant's explanation in cross-examination or otherwise, but on the contrary relied on it as involving gross carelessness on the appellant's part, and as the cases of overcharging were never put as cases involving fraud or dishonesty on the appellant's part as distinct from carelessness or negligence, the Disciplinary Committee must be taken to have accepted the appellant's explanation as true, and to have held that his conduct with regard to the cases in paragraphs (1) and (3) amounted, on his own explanation of it, to infamous or disgraceful conduct.

The question, then, was whether, on that view of the facts, the Disciplinary Committee was justified in finding the appellant guilty of infamous or disgraceful conduct. It must be remembered that these words should be construed with the words " in a professional respect." Granted that, in accordance with Lord Esher's definition of " infamous " conduct in a professional respect, in *Allinson* v. *General Council of Medical Education and Registration* ([1894] 1 Q.B. 750, at p. 760), the full derogatory force of the adjectives " infamous " and " disgraceful " in section 25 of the Act of 1957 must be qualified by the consideration that what was being judged was the conduct of a dentist in a professional respect, which fell to be judged in relation to the accepted ethical standards of his profession, those two adjectives nevertheless remained as terms denoting conduct deserving of the strongest reprobation, and, indeed, so heinous as to merit, when proved, the extreme professional penalty of striking off.

To make good a charge of infamous or disgraceful conduct in a professional respect in relation to such a matter as the keeping of prescribed dental records it was not enough to show that the appellant had made some mistake through carelessness or inadvertence in two or even three cases out of several hundred patients treated during the period in which the mistakes occurred, whether the carelessness or inadvertence consisted in some act or omission by the dentist himself or in his ill-advised delegation of the making of the relevant entries to a nurse or receptionist and omitting to check the forms to see that she had done what she was told. To make good such a charge there must, generally speaking, be some element of moral turpitude or fraud or dishonesty in the conduct complained of, or such persistent and reckless disregard of the dentist's duty with regard to records as could be said to amount to dishonesty for that purpose. The question was to some extent one of degree, but in the Board's view the cases of overcharging with which the appeal was concerned clearly fell short of the degree of culpability required. As to the case of wrongful certification, the Board could not regard it as amounting to infamous or disgraceful conduct. With regard to the treatment alleged to have been unnecessary, the evidence showed that, according to the appellant, he honestly believed it to be necessary (or likely to be found necessary), while the dentists who disagreed with him did not claim that the opinion which the appellant expressed was one which no dentist could honestly hold. In that state of the evidence it would be wrong to impute to the Disciplinary Committee an implied finding to the effect that the appellant did not honestly hold that opinion. An honestly held opinion, even if wrong, plainly could not amount to infamous or disgraceful conduct. The Board found themselves unable to hold that the appellant was rightly found guilty of infamous or disgraceful conduct in relation to the facts alleged, and the appeal would be allowed.

Union of benefices: Jurisdiction of Judicial Committee of Privy Council.

In *Parochial Church Council of Little Leigh* v. *Church Commissioners* ([1960] 1 W.L.R. 567) a question of jurisdiction was raised on the appeal by the Parochial Church Council of Little Leigh against a scheme formulated by the respondents, the Church Commissioners for England, for the union of the benefices of Little Leigh and Lower Whitley, both in the diocese of Chester. Section 3 (2) of the Pastoral Reorganisation Measure, 1949, provided: "In making their recommendations the committee shall take into account each of the following matters: (*a*) the making of the best possible provision for the ministry of the Word and Sacraments in the diocese as a whole, including the provision of appropriate spheres of work and conditions of service for all persons engaged in the cure of souls and the provision of reasonable remuneration for such persons; (*b*) respect for the traditions, needs and characteristics of individual parishes; and (*c*) the possibility of the use of the ministry of duly authorised laymen."

In the course of their report sanctioning the scheme the Board stated that at the outset of his argument in support of the scheme counsel for the respondents submitted (in effect) that, as it was not shown that the Pastoral Committee in making their recommendations or the Bishop in approving them had failed to take into account any of the matters set out in section 3 (2) of the Pastoral Reorganisation Measure, 1949, or that the

Committee, the Bishop or the Church Commissioners had in any other respect failed to comply with the terms of the relevant legislation, the appeal must be dismissed, the Board having no jurisdiction to interfere with such a scheme unless it was shown to be vitiated by some such irregularity. The Board had no hesitation in rejecting that argument. It appeared to them that the right of appeal conferred by section 10 (3), and the jurisdiction with respect to appeals conferred by section 10 (5), of the Union of Benefices Measure, 1923, were plainly wide enough to empower the Board to consider any scheme submitted to them on appeal *de novo* and on its merits. That did not, however, mean that their Lordships should not be slow to dissent, save for the most cogent reasons, from the recommendations embodied in a scheme regularly brought into existence with the concurrent approval of the Pastoral Committee, the Bishop and the Church Commissioners, and with proper regard for the matters stated in section 3 (2) of the Measure of 1949.

4. REPORTS

(*a*) *Conflicts of Jurisdiction Affecting Children*

A litigant may legitimately question the functional efficiency of a legal system when, instead of participating in a judicial inquiry into the merits of his case, he finds himself bearing the costs of a pointless controversy between two sets of courts as to which should exercise jurisdiction. This is a problem which is faced even in a unitary legal system when different rules of law and different courts are appropriated to different questions and, in some countries, a *tribunal des conflits* is established to resolve such disputes. But the problem becomes especially acute in countries, like the United Kingdom, which are apportioned territorially among several legal systems, each with its own peculiar rules of law and hierarchy of courts.

On February 5, 1958, the Lord Chancellor appointed a Committee with a strong Scottish representation to inquire into one small fragment of this general problem, and its Report was recently published as a Command Paper (Cmnd. 842, 1959). The Committee's terms of reference were as follows: " To consider and report what alterations in the law and practice are desirable to avoid conflicts of jurisdiction between courts in the different parts of the United Kingdom in proceedings relating to the custody of children and to wards of court and to ensure the more effective enforcement of orders made in such proceedings outside the part of the United Kingdom in which they were made." It is notorious that these conflicts of jurisdiction are caused by a combination of slight differences in the substantive law with a major difference of principle in the manner in which jurisdiction is assumed. The Court of Session recognises " that the pre-eminent jurisdiction in questions of custody rests in the courts of the domicile of the father of the child and, in the case of a child whose father is domiciled elsewhere, would be slow to make an order, other than an interim order, for the immediate protection of such a child " (para. 23 of the Report). It concerns itself, moreover, only with children under sixteen. The Chancery Division of the English High Court, on the other hand, claims jurisdiction over all persons under twenty-one present in England and Wales whether or not domiciled there and will in certain cases assume jurisdiction over persons who are resident outside its jurisdiction if it thinks that effectiveness may be secured by such means as sequestration of property. The Chancery Division, for example, does not feel that it is debarred from dealing with questions relating to the custody of children domiciled in Scotland who happen to be physically present in England. This has occasionally led to what has been called the " legal kidnapping " of Scottish children when this has appeared tactically advantageous to one of the parties to a custody dispute. In *Babington* v. *Babington* (1955 S.C. 115; 1955 S.L.T. 170) an order for access made by the Court of Session, the court of the domicile, was rendered nugatory by a contrary order on the part of the Court of Chancery, which had assumed jurisdiction on the basis of the child's presence in England.

The Committee decided in effect to extend to England and to Northern Ireland the Scottish principle that a basis of jurisdiction should be established " which, while it should not be rigidly exclusive, should at any rate be pre-eminent amongst other competing jurisdictions " (para. 43). The Report rejects as a criterion for this pre-eminent jurisdiction the mere physical presence of the child within the jurisdiction. This, it was thought, would serve merely to aggravate the existing problem of tactical kidnapping. But it also rejected the approach adopted in the

Scottish courts that the test for pre-eminent jurisdiction should be founded upon the concept of domicile. It was felt that the concept of domicile raised difficult questions of law and fact, " especially of intention," and it would clearly be futile to substitute one kind of dispute for another. It is arguable, however, that the alternative test recommended by the Committee, namely the " ordinary residence of the child at the time of the application," is open to objections which are similar in kind.

The term residence has been given different meanings in different branches of the law (*cf.* Dicey's *Conflict of Laws*, 7th ed., p. 95) and, while there are dicta which suggest that in some contexts no distinction can be drawn between presence and residence, there are other cases which distinguish between the two. The precise basis of the distinction is nowhere very explicitly stated, but it would seem to lie in the existence of an intention, however inchoate, to remain more than temporarily in the place of residence. If this is so, proof of intention is not entirely excluded by the choice of the concept of " ordinary residence." The Committee appears to recognise this when it says that the difficulties of proof of intention in such cases " are much less formidable than those arising in domicile cases." In any case the Committee was content to leave to the courts the precise delimitation of the concept of " ordinary residence " (para. 49). Even assuming, however, that they can do this satisfactorily, several difficulties remain. " Ordinary residence," as Mr. Michael Albery, Q.C., points out in a note of dissent, " is inherently an unsatisfactory test to meet the problem of legal kidnapping." An alternative proposal, made by the Faculty of Advocates and designed to answer this problem, is that the court of the ordinary residence should have pre-eminent jurisdiction, " so, however, that, where the child's country of residence had been changed by one parent without the consent of the other within the six months preceding the commencement of proceedings, the court of the residence before such removal should have jurisdiction to the exclusion of the court of the new residence " (para. 48). The Committee rejected this proposal on the ground that the " courts are well able to distinguish between genuine and tactical changes of residence, without the need for any prescribed test." This complacent assertion, however, must be regarded in the light of the conspicuous failure of our courts to develop in other fields theories of " evasion of the law " analogous to those developed in Continental systems.

The crucial question is really this: whether the Committee has made out a satisfactory case for preferring the test of " ordinary residence " to that of domicile. The Committee itself proposes that the concept of domicile be utilised in another context (paras. 55 and 60 (vi)) and domicile will still be the test, in Scotland at least, in cases involving an extra-United Kingdom conflict. The regulation of most Anglo-Scottish conflicts of law and jurisdiction has hitherto been based in principle upon the ordinary rules of international law and, for this reason, it is thought that the onus should always rest upon anyone who seeks to depart from that principle and to establish special inter-local rules. For the reasons given above it is felt that the Committee has not discharged this onus. If, as everyone hopes, Parliament will soon redefine the concept of domicile the objections to its use in this context would largely disappear.

Various other recommendations are made by the Committee. It is unanimously recommended that provision should be made for the reciprocal enforcement in the three parts of the United Kingdom, not only of custody orders, but of all orders affecting the care of children, including access, religious upbringing and education. This proposal is made without explanation as if it raised no controversial issues and was too obvious to need comment, but it is not without importance: it would mean, for example, putting a stop to Gretna Green marriages by English wards of court. The converse, so to speak, of this recommendation is the suggestion that, when in England or Northern Ireland application is made to have a child made a ward of court, a child domiciled in Scotland should be entitled to plead in bar of the Chancery proceedings that he is over sixteen and, although ordinarily resident in England or Northern Ireland, is domiciled in Scotland. The Committee also makes one or two proposals of a minor nature affecting Scotland. It recommends that " all courts should have a discretion to hear in private any application concerning a child " (paras. 57, 58 and 60 (viii)) and that the Outer House of the Court of Session should have jurisdiction to entertain custody applications (paras. 59 and 60 (ix)).

The implementation of this Report would undoubtedly help to reduce Anglo-Scottish conflicts of jurisdiction in matters affecting children. It is submitted, however, that the Committee's major proposal is not an entirely satisfactory one and that the question should be reconsidered in the context of a broader inquiry into the general problem of Anglo-Scottish conflicts of law and jurisdiction.

A. E. ANTON.

(b) *Civil Jury Trial in Scotland*

In November 1957 the Secretary of State for Scotland appointed a Committee under the chairmanship of Lord Strachan with the following terms of reference: "To consider (1) whether, and if so to what extent, the existing right to jury trial in civil actions in Scotland should be abolished or limited; (2) whether, in the light of our conclusions under (1), (a) any change should be made in the jurisdiction or procedure of the Court of Session and the Sheriff Courts in such actions, and (b) any steps should be taken to expedite the hearing of such actions and to reduce the expense thereof, and to report." The Committee issued its report in November 1959. In addition to Lord Strachan the Committee consisted of one sheriff-substitute, two advocates, three solicitors and three laymen.

On the major issue, the retention or abolition of civil jury trial in the Court of Session, the Committee was divided. Seven of its members recommended that civil jury trial should not be abolished, whilst three (Sheriff S. G. Kermack and two of the lay members, Dr. May D. Baird and Mr. Douglas A. Foulis), in a minority report, recommended the complete abolition of the civil jury trial. Sheriff Kermack also wrote a most interesting note on the possible use of lay members in court. The report reveals a fundamental difference in the approach to this problem: the majority proceeded upon the view that as civil jury trial is now an established part of the judicial system of Scotland it should not be abolished unless it is proved that to a material extent it fails to effect justice between parties, and they found that that had not been established by the evidence. The minority rejected this approach and argued that the question must be examined on the basis of whether the system of jury trial can any longer be justified and whether it can be demonstrated that jury trial has definite advantages in comparison with trial by a judge alone. Apart from this basic difference of opinion the members of the

Committee were broadly in agreement in regard to the other matters dealt with in the report.

The system of civil jury trial which exists in Scotland today was introduced in the Court of Session in 1815 and in the Sheriff Courts in 1907. In the Court of Session from 1900 to 1926 there was an average of twenty-one jury trials annually; from 1927 to 1938 the average annual number was forty-six; while from 1949 to 1958 there were in all 803 jury trials. These figures relate to actions which actually went to trial. An indication of the growing popularity of jury trials is the fact that in April 1958 there were, in the Court of Session, 395 cases awaiting trial, in which jury trial had been asked for and allowed. In the Sheriff Courts, however, civil jury trial has never been popular, from 1949 to 1958 the total number being only sixty-one. Since 1815 civil jury trial has been considered by four Commissions, namely, in 1823, 1830, 1868 and 1926. The last two expressed some dissatisfaction with the jury system but none recommended its abolition.

The majority report considers at some length the arguments in favour of (a) abolishing, and (b) continuing, civil jury trial. These arguments and the conclusions of the majority may be briefly summarised here. There are six principal criticisms of and objections to jury trial.

A jury is not the best body to decide questions of fact where the evidence is protracted or unusually complex, but this is merely a reason for withholding such cases from jury trial and not a reason for abolishing jury trial althogether. In ordinary accident cases, which form the great majority of jury cases, the issue is comparatively simple and it is impossible to hold that the average jury is not capable of appreciating and weighing up the evidence in such a case; and in assessing credibility a jury is at least as likely as a judge to see where truth lies.

Secondly, a jury's verdict is apt to be based on sympathy for a pursuer. The report states that the belief that a jury is influenced by sympathy for the pursuer is widely held among those who usually represent the interests of defenders, but that practically no evidence to support this view had been adduced. The official statistics for the ten-year period 1949–58 reveal that 30 per cent. of jury verdicts were in favour of defenders. The remaining 70 per cent. included cases where the pursuers were held partly to blame. Out of this 70 per cent. at least half were cases where the jury held the pursuer partly to blame. It is clear therefore that the statistics do not support this objection.

The third objection is that juries are known to make mistakes, but the Committee hold that these relate mostly to the assessment of damages where there has been contributory negligence and propose a method for obviating it.

The report rejects out of hand the objection that a jury trial is longer and more expensive than a proof before a judge alone as not being in accordance with fact.

It is maintained that as a jury's verdict is inscrutable a defender is often unable to tell on what ground he has been held to be in fault, and is deprived of any chance of succeeding in getting the verdict set aside. The majority do not regard this as a good ground for abolishing jury trial but agree that it is wrong that a defender should be kept in ignorance of the ground upon which he has been held to be in fault and suggest a remedy. This matter is further adverted to below.

Finally, it is argued that as civil jury trial was imported in 1815 from England and has been practically abolished in England it is anomalous to retain it in Scotland, but the majority point out that in fact jury trial has not been abolished in England.

The majority then turned to consider the arguments in favour of the continuance of jury trial, several of which may be briefly referred to here.

It is argued that the relative finality of a jury verdict is a good thing, looking particularly to the question of the expense and delay of appeals. The report does not refer to any figures on the question of finality. But a study of the official statistics reveals that in the three-year period 1954–56 there were 287 jury trials; that in fifty-six of these cases there was an appeal to the Inner House to order a retrial, and that only eight of these appeals succeeded. While it is not an exact comparison it is worth noting in passing that the official statistics reveal that for the period 1925–56 there were 1696 appeals from Outer House judges sitting alone, and in 519 cases the Inner House reversed the judge of first instance, a percentage of 30·6. The majority took the view that the hardship on appeal to an individual on the score of expense adverted to by Lord Aitchison in the case of *Graham* v. *Paterson & Sons* (1938 S.C. 119 at 128; 1938 S.L.T.

174 at 178) had been considerably mitigated because of the legal aid system, and in the case of actions taken up by a trade union, because the union will bear the expense. The report accepts that jury trial is more likely to give the pursuer a quicker result, which is held to be desirable, because it is the case that the verdict of a jury has a much greater degree of finality than the decision of a Lord Ordinary.

The report comments upon the failure of the summary trial (with the consent of parties and before a judge selected by them) provided for in section 10 of the Administration of Justice (Scotland) Act, 1933, to attract litigants, and makes the admirable suggestion that the section might be amended to provide for a court of three judges, instead of only one, as a means of popularising this form of trial. This suggestion seems particularly apposite in view of the notorious under-employment of the Inner House.

The next argument in favour of jury trial is that there is a tendency for a jury to give a higher (and more realistic) award of damages than would be given in a case without a jury. The majority hold that a jury is a suitable body to assess damages, and taken as a whole they do so satisfactorily; that to some extent there is a tendency for juries to give slightly higher awards than judges; and that there is more chance of lessening any gap that may exist between English and Scottish awards, if the assessment of damages continues to be made by juries. This last finding is of particular interest because those who favour abolition of jury trial sometimes argue that the higher awards granted in England are due to the fact that the action is heard before a judge alone.

Another argument in support of jury trial is that it is in the public interest that laymen should be associated with the administration of justice and that the jury system affords the best means of doing so. The majority believe that it is a good thing that laymen should be associated to some extent with the administration of justice and that it is an advantage to have the benefits of the lay mind in deciding claims which may greatly affect the lives of people who have been injured or who by the death of a breadwinner have lost a means of support.

The grounds on which the minority support the abolition of jury trial are not always easy to understand. They point out that the great majority of witnesses who gave evidence favoured abolition. This is perhaps not very convincing.

The minority state that no one has reported that there is a widespread lack of confidence in trial by a single judge but there is such a lack of confidence in civil jury trial. Few practitioners would quarrel with the first part of this statement, if the pre-1933 practice, whereby a pursuer could choose his judge, still prevailed. But it is certainly not the case that litigants invariably have complete confidence in every Outer House judge.

The next ground for abolition appears to be that in England itself jury trial has largely disappeared, without public demur, and that it would be paradoxical if Scotland should retain an imported institution when it is in decline in England where it is indigenous. It is not clear whether the minority are aware of the reasons for the decline in jury trial in England. Lord Justice Devlin attributes the decline, in part at least, to the fact that the verdict of a jury is more expensive and too much of a luxury for the ordinary user. This in the view of the majority is not the case in Scotland. The other main reason is that since 1933, in England, the master or a judge has had an absolute discretion as to whether a case should go to proof or jury trial, with seven exceptions; and although the seven exceptions include actions for slander or libel, they do not include accident cases. In Scotland, broadly, judges enjoy no such discretion.

The minority reject the view that juries are better than judges in assessing damages and judging of credibility. They are not impressed by the finality which attaches to the verdict of a jury.

Both the majority and minority reports urge that Sheriff Kermack's views, set out in his note, as to the advantages of mixed tribunals should receive further consideration. The note deals with the advantages of a tribunal consisting of a professional judge sitting with two or more laymen. A considerable body of written evidence relating to mixed tribunals in a number of European countries was apparently before the Committee and it is perhaps unfortunate that no legal experts from these countries were called upon to give oral evidence as to their working.

To sum up: the minority report was signed by Sheriff Kermack and two laymen with no first-hand experience of courts of law. The majority report was signed by seven members of the Committee, of whom five have had long first-hand experience of the working of the civil jury system in the Court of Session. It is difficult not to regard the majority report as weightier not merely in numbers, but in power of reasoning, and to hold that there is little in it that will not bear critical examination.

Most lawyers will probably accept the recommendations of the Committee as a whole that civil jury trial in the Court of Session should be limited to (a) actions of damages for personal injury or death caused by delict, including actions of slander; (b) actions for breach of promise or seduction; and (c) actions for malicious prosecution or wrongful arrest or imprisonment; that civil jury trial in the Sheriff Court should be abolished; and that the minimum limit on the jurisdiction of the Court of Session should be raised from £50 to £250.

But there are certain other recommendations which must be viewed with serious doubt. The first of these relates to special cause. The Committee propose that the decision on special cause should continue to be a matter for the discretion of the Lord Ordinary, but that his discretion should be exercised on broader lines than at present. In this proposal there lies a real danger. At least some experienced members of the bar take the view that since 1945 there has been a growing tendency to accept as special cause, circumstances which would never have been so accepted prior to that date. The legislature has conferred upon the citizen the right to trial by jury, and that right must not be allowed to be largely eroded by placing too wide an interpretation upon what constitutes special cause. The Committee propose that in addition to the circumstances which are already recognised as amounting to special cause it should be held that there is special cause: (1) where it is likely that the trial will be protracted, *e.g.*, where it may last for more than three days; or (2) where the evidence will be complicated or technical; or (3) where important questions as to the admissibility of evidence will arise. On all these points there will usually be room for wide differences of view, and if they are to be treated as special cause it may well result in a serious narrowing of the right which the citizen enjoys to trial by jury.

The Committee by a majority of nine to one rejected a proposal that there should be an upper limit on the jurisdiction of the Sheriff Court. Their grounds for so doing were that the Sheriff Courts were more convenient to litigants who do not live near Edinburgh; that the lower court provides a less expensive form of litigation; that in practice quite a number of cases for large sums are raised in the Sheriff Courts; and that the public has had access to the Sheriff Courts for such cases for a very long period. There is considerable force in all this, but is it really conclusive? It overlooks two important considerations. In cases of serious injury or death the sums sued for are large and it becomes increasingly important for the pursuer to have his case presented in the best possible manner. If such cases are presented in the Sheriff Court the written pleadings and the manner in which the case is conducted will in many cases be markedly inferior to that which would be obtainable in the Court of Session, because solicitors are part-time pleaders while advocates are whole-time pleaders. It is idle to say that these defects can be remedied if an appeal is taken to the Inner House: in many cases they cannot, with the result that a litigant may suffer serious injustice which will affect him for the rest of his life. It is to be regretted that in dealing with this issue the Committee did not consider, as a possible alternative to an upper limit, a rule that in all cases in the Sheriff Court, where a sum in excess of say £1,000 is sued for, a junior counsel must be employed (1) to adjust finally the written pleadings and (2) to conduct the case in court.

But the most controversial recommendation is that, where an action is laid on two or more grounds, the jury, if they find for the pursuer, should be required to state on which ground of fault their verdict is based, instead of returning as at present a general verdict of fault. The justification for this proposal is that in the view of the Committee a general verdict for the pursuer leaves the employer in complete ignorance of the ground on which he has been found to be in fault, which is not fair or right to the employer, and does not contribute to the safety of employees generally, for an employer who is anxious to take proper precautions in the future to prevent a similar accident is not told which ground the jury have held to be established. It is surely difficult to take this reasoning seriously. By the time the jury has been charged the defenders can be left in no doubt as to where the main burden of criticism rests, and it is easy for them to take steps to consider whether the ground of fault principally stressed, and all the other grounds of fault, are such that they call for early remedial action on their part. To give effect to this recommendation would go far to reduce what the majority of the Committee find to be one of the strongest grounds for the retention of the jury, its finality, because it would almost certainly result in a great increase in the number of appeals.

This recommendation is all the more astonishing in the light of the Committee's reaction to another proposal. It was suggested to the Committee that in, *e.g.*, a master and servant case, where there are three heads of claim, *viz.*, *solatium*, loss of earnings to date and estimated future loss of earnings, the jury should be required to say what sum they award under each head, and not merely to return one total sum. The Committee rejected this proposal out of hand on the ground that its only object is to facilitate a motion for a new trial and that they deprecate any proposal which is made merely for the purpose of facilitating appeals. But surely this lies at the base of the proposal that a jury should be required to state on which of several grounds their verdict is based.

The report is notable for its lucidity and is full of material which is of the greatest interest to all concerned with the working of our courts in Scotland.

SINCLAIR SHAW.

(c) *Report of the Scottish Advisory Council on the Treatment of Offenders, on the Use of Short Sentences of Imprisonment by the Courts*

This Report, the work of a Committee of the recently reconstituted and appointed Advisory Council on the Treatment of Offenders, and endorsed without qualification by the Council, was prepared with commendable expedition. Even so, one of its principal recommendations (namely, that no person—not only those under twenty-one years of age—who is a first offender should be sentenced to imprisonment unless the court is of opinion that no other method of dealing with him is appropriate) was anticipated by Mr. W. Small, M.P., who presented the First Offenders (Scotland) Bill to the House of Commons in November 1959.

This piece of legislation is identical with the First Offenders Act, 1958, which applies to England and Wales; it had an uninterrupted passage through both Houses of Parliament and came into force in May 1960. Although the Report does not disclose what measure of success the English Act has achieved, no doubt the recommendation of the Committee that similar legislation should be enacted for Scotland was not a sincere form of flattery but was made only after examination of the operation of its counterpart in England. It will be interesting to see if, and how, the provisions of the new Act work in practice in Scotland. At first sight it would seem that not inconsiderable practical problems may be involved in ascertaining that an accused, although a " first offender " in one police area, has a clean record in all other areas—including those in England and Wales.

The terms of reference of the Committee were extensive and embraced matters which deserve more detailed explanation than could possibly be incorporated within the small compass of the Report. They were " (a) to review the use made by the courts of short sentences of imprisonment, including imprisonment in default of paying fines, and to examine the value and effects of short sentences; and (b) to consider the law restricting the imposition of imprisonment by the courts." The references in the Report to many of the fundamental difficulties connected with sentencing and punishment indicate that the members of the Committee were very well aware of the complicated nature of the task which they were asked to undertake. Profound as may have been their consideration of all the problems with which they were faced, the time within which and the facilities necessary to carry out a detailed examination of all the relevant aspects of such problems were apparently not available.

For the purpose of their inquiry the Committee took a short sentence to mean one of six months or less. With full remission for good behaviour this means that a prisoner is detained for only four months.

As a basis upon which to found their inquiry the Committee obtained details of the number of persons received into Scottish prisons during 1958 on short sentences. These amounted to 11,184, representing 92 per cent. of all prisoners received during the year. Of these 4,136, or 34 per cent. of all those received, were imprisoned in default of paying fines. These very impressive statistics, set against the figures contained in the recently published annual volume of *Criminal Statistics for Scotland*, which discloses that the number of crimes and offences made known to the police in 1959 has increased by 13,998, or nearly six per cent. compared with 1958, prompt the reaction that short sentences are not one way to help in the reduction of crime.

Although the Committee believe, as did the English Advisory Council on the Treatment of Offenders which in 1957 issued a Report on Alternatives to Short Terms of Imprisonment, that short sentences have a definite and necessary place in our criminal law, they reached the conclusion that they are used too widely and in some cases automatically.

Examining the possible value and effect of such sentences of imprisonment, the Committee reached the conclusion that: "Although it is difficult to generalise about the effect of a short term of imprisonment, we are satisfied that in many cases the serving of the sentence makes it more likely, rather than less, that the offender will give way to further criminal impulses. The immediate impact of prison tends to rob a man, or a woman, of healthy self respect: loss of personal belongings and privacy carries with it some loss of identity. There follows an association with other law breakers who have been guilty of a great variety of offences."

Reformation being the declared aim of all punishment, the Committee were satisfied that a period of six months' imprisonment (in effect only four months) is an insufficient time within which the prison authorities could commence and complete, with any hope of success, reformative training. The Committee pointed out that in certain cases the side effects of a short prison sentence might ensure that the law breaker mended his ways, "particularly where the prisoner is a woman or a man who has moved in circles where the law is respected (although some of these offenders would have been sufficiently deterred by their court appearances)." The Committee accordingly concluded that, in cases where a sentence of imprisonment was called for, it should be a comparatively long one—anything less than one year being scarcely sufficient for reformative purposes—and recommended that sheriffs sitting summarily should be empowered to impose up to one year's imprisonment for a second or subsequent conviction of an offence inferring dishonesty or personal violence.

In seeking alternatives to short sentences of imprisonment in many cases the Committee recommended the imposition of heavier fines: this to be achieved by a very considerable upward revision of the ridiculously low maxima of certain fines. They recommended that in common law cases the maximum fine which may be imposed by the burgh (police) or justice of the peace courts should be increased to £50, and by the Sheriff Summary Court to £250.

In connection with fines the Committee made a very valuable study of the question of imprisonment in default of paying fines. The majority of the recommendations put forward as a result of the examination of this problem are realistic, particularly in so far as they might reduce the imprisonment of young offenders for failure to pay fines.

The other alternative to short sentences which the Committee recommended is the increased use of probation : this to be accomplished not only by a court making a straightforward probation order but by the use of the probation service to undertake the after-care and supervision following upon release of offenders who have been sentenced to imprisonment and the supervising of offenders who have been fined, until the fine is paid.

With the additional duties which the First Offenders Act may place upon the probation service in Scotland, the further recommendations of the Committee, if accepted, would increase very considerably the duties of the officers of that service. In the principal urban centres in Scotland where the service is working with an adequate establishment of posts, difficulties already exist in filling such posts with suitable appointees and in some areas, either apparently through insufficient established posts or shortages of staff, or both, probation officers have difficulty in overtaking all the work required of them. The further responsibilities which the Committee's recommendations would impose on probation officers might have the effect of so overworking them that some courts might be discouraged from using adequately the straightforward probation provisions. The Committee, however, received evidence from the National Association of Probation Officers (Scottish Branch), and accordingly it must be assumed that no fears need be entertained regarding the ability of the probation service to undertake the work connected with the recommendations, should they be implemented.

The Committee examined, and very properly rejected, as another alternative to the short sentence the suspended sentence. The principal objection to it is set out in paragraph 45 of the Report, " . . . it would be extremely difficult for a court to decide upon a sentence which could appropriately operate at an unknown future date in circumstances which could not be foreseen; and that it might well be unjust for the sentence to be executed automatically when the offender committed a further offence of any kind."

Although of opinion that the deferred sentence did not have the positive advantages of a period of probation, the Committee were in favour of its use. In the belief that the legality of so proceeding was in doubt the Committee recommended that legislation should be enacted to remove such doubt.

If legislation is to be drafted to give effect to this and other recommendations in the Report, it is a pity that the Committee did not take into account, examine and report upon the development of the powers of summary courts to ordain persons to find caution to be of good behaviour—which may be yet another possibly desirable alternative to short sentences—so that consideration might have been given to its incorporation into any proposed new legislation. Judging from its use in other countries, the power to order a convicted person to give an undertaking to be of good behaviour for a number of years (not just one year, which is the present maximum in the Sheriff Court) and to provide a guarantee of a substantial sum (the present maximum amount is only £25) might be a valuable deterrent sentence. If within that period such person contravened the law, not only would he be liable to come before the court to be sentenced in respect of the former offence but also the substantial security which he was required to find to guarantee his good behaviour might be forfeited. This sentence, which has none of the disadvantages of the suspended sentence, adds to the merits of the deferred sentence a further Damoclean financial sanction.

J. V. M. S.

CURRENT PERIODICAL LITERATURE

By K. W. B. Middleton, b.a., ll.b., Advocate, Sheriff-Substitute of the Lothians and Peebles

CRIME AND PUNISHMENT

The foundation stone of Holloway Prison, laid in 1849, bears the inscription: "May God preserve the City of London and make this place a terror to evildoers." These few words are enough to show the revolution in our ideas about the proper treatment of crime during the last hundred years, a mental revolution which is really just as startling as any of the more obvious changes that have taken place in material circumstances and modes of living in the same period. Up to the end of the nineteenth century prisons were frankly and deliberately places of punishment, in which the prisoners were kept completely or as nearly as possible isolated, whether in their cells at labour or at exercise, in surroundings purposely grim and depressing, and set to work on machines, like the treadmill, intended to be irksome, fatiguing, unproductive, and so degrading. Their moral reformation, in so far as it was considered as an aim at all, was regarded merely as a by-product of the discipline of punishment. It is well to remember that this system, savage though it seems to us, was a great improvement in most respects, though perhaps also more inhuman because of its greater efficiency, on the scandalous absence of system that preceded it. Due supervision was maintained by the institution of the Prison Commissioners over prison administration, fair standards of accommodation, diet and clothing were established, rates of mortality and disease were reduced.

The dividing line which separated the retributive from the present-day approach to the treatment of crime was the report of the Gladstone Committee in 1895. Solitary imprisonment, unproductive labour at the treadmill and the crank, the uncompromisingly punitive character of the nineteenth-century system were condemned, and it was recommended that new and more thorough measures should be taken to classify offenders and differentiate in methods of treatment according to their ages and records. The object of a prison sentence should be to stimulate the higher susceptibilities of prisoners, rather than to punish them, to train them in orderly and industrious habits, and to turn them out of prison better men and women physically and morally than when they came in.

The developments during the fifty years following the report of the Gladstone Committee have been a gradual realisation, through both legislative and administrative change, but especially the latter, of the principles laid down in the report. The grand effect of the reforms made has been tremendous, as Dr. Radzinowicz observes in the *Law Quarterly Review* for July 1959. Only sixty years ago as many as 22,000, or about 12 per cent., of the entire prison population were between twelve and twenty-one years of age. Today not more than one or two out of every hundred offenders under twenty-one found guilty of the more serious offences are sent to prison, and the prison population as a whole has been reduced from 145,000 before the First World War to 35,000. These are figures for England and Wales. In Scotland a comparatively higher number than in England of prison sentences is imposed, and nearly 10 per cent. of those imprisoned in 1958 were under twenty-one. The proportion of young adults imprisoned will presumably be smaller this year, now that the first Scottish detention centre has been opened, six years after the first English one. Conditions in prison have altered as strikingly as the reduction in the numbers sent to prison, or perhaps we should say conditions in some prisons and for some prisoners. Rehabilitation has taken the place of punishment. Prisoners are given useful work and vocational training; recreational and educational facilities, and means of keeping in touch with the outside world and with friends and relatives are provided; preservation of self-respect and interest in life are encouraged, as by the abolition of distinctive prison clothing and permission to keep personal belongings in cells. Enlightened ideas are carried to their furthest by the institution of open prisons, a mainly new development since the last war.

"The curve of crime behaviour," Dr. Radzinowicz says, "throws a disturbing shadow on these generous and bold advances." Serious crime in England and Wales has doubled in the last thirty years, and crimes of violence have risen even more steeply. In Scotland the trend has been similar but less marked. The increase extends to all sorts of offences and to offenders of every age group. It is natural to assume that reduced severity in dealing with crime is the cause of the increase. Dr. Radzinowicz thinks that this view is not supported by experience. He points out that in the latter part of the Victorian era crime decreased appreciably and steadily in spite of a progressively more lenient sentencing policy, while in the preceding fifty years greater rigour of punishment coincided with an increase of crime. People are inclined, in his opinion, to simplify the causation of crime and to exaggerate the influence of criminal legislation and the penal system upon it. Sanguine reformers have suggested all kinds of panaceas, and many of the measures advocated by them have been adopted, but crime remains a constant phenomenon in all societies whatever means of prevention and deterrence are tried, recoiling at one time only to surge forward at another.

It may be that the recent crime wave is only temporary and that the pre-war state of affairs will return sooner or later. On the other hand, there are some reasons for supposing that this is not so. For one thing, the increase in crime has occurred at a period of economic prosperity and full employment, and not of depression. Another reason is the ominous fact of the growth of serious offences committed by juveniles. Moreover, the increase is general throughout other Western countries and is not confined to Great Britain.

The argument drawn from the more lenient sentencing policy in later Victorian times is not entirely convincing. In the eighteenth and early nineteenth centuries penalties and sentences were shockingly harsh according to our notions. The consequence was that juries refused to convict. The number of death sentences actually carried out amounted to a mere fraction of those that should have been if the criminal law had been rigorously applied. In his famous book, *Of Crimes and Punishments*, Beccaria argued two hundred years ago that the best way to prevent crime was to make punishment more certain rather than more severe. It took a long time for the theory to be accepted, but by the later nineteenth century it was well established. The decrease in crime was due probably in part to the greater consistency with which it was punished rather than to lighter sentences, and no doubt even more to improved measures for prevention and detection. It was not till 1829 that the first effective police force was set up for London by Peel and only a good many years afterwards that the system adopted for the metropolis was extended over the whole country. A separate detective force for the Metropolitan Police was instituted, following the example of the French, in 1878. Thorough and scientific provision for the investigation and detection of crime is thus of quite recent date. It took more than a century for the ideas of penal reform put forward by Beccaria, and in this country by Bentham, Romilly and others, to be put into practice. Similarly, we may suppose that it takes a considerable time for an alteration in methods of dealing with crime to have an effect on its incidence, a general and permanent effect that is to say, since experience seems to show that a sudden and drastic increase of penalty for a particular offence in a particular area may have good results at least for a time.

It is arguable, therefore, that the growth of crime in the last twenty years is directly connected with the more sympathetic attitude towards criminals which followed the recommendations of the Gladstone Committee, or in any event, what is more likely, that there is some sort of indirect connection. Nowadays everybody is inclined to be, or pretends to be, more humane and considerate towards those over whom he has authority than was customary in Victorian days. Parents are kinder to their children, schoolmasters to their pupils, employers to their workpeople and theologians to sinners, just as jailers are to prisoners. The very word "punishment" has become outmoded and sounds rather indecent. All this proves that we are more civilised than our great-grandfathers. But there are disadvantages. Human beings have always needed both the stick and the carrot, and it is difficult to draw the line between kind treatment and soft treatment. To maintain discipline successfully without any resort to punitive methods is possible, but requires more skill and patience than most people perhaps are capable of. There is as much delusion in believing that offenders can be educated and trained out of criminal ways as in believing they can be flogged out of them. The more lenient treatment of criminals has then perhaps not been in itself a cause of the increase in crime. There is more reason for blaming a general relaxation of discipline and erosion of traditional values, together with changes in family life and social structure which have been favourable to rebellion against conventional restraints and to contempt for accepted standards of behaviour.

It is little use, however, groaning over the evils of the present age, since we cannot put the clock back. In any case, vague generalisations about the causes of crime or the effects of sentencing policies are inconclusive. Thus the Royal Commission on Capital Punishment was unable to come to any decided view, in spite of fairly ample statistical evidence, about the effect of death sentences on the rate of murders.

Increased severity in dealing with crime may sometimes have a beneficial result, but in other circumstances it may not. All that can safely be said of the present increase in crime is that it is largely a mystery.

The question is not one which is wrapped in obscurity because it is insufficiently discussed. On the contrary, there is no subject perhaps which attracts so much public interest and arouses so much feeling having regard to its intrinsic importance. Indeed, we may suspect that the amount of publicity that criminals receive tends to lead other persons into imitating them. The extremists on both sides are open to the charge of sentimentality. Those who call out for severer punishments can be accused of being more concerned with taking revenge on criminals than with deterring them from crime. The reformers, on the other hand, are often too much interested in rehabilitating the offender to remember his victim.

Without doubt some prisoners may be rehabilitated, and it should be the aim of prison authorities to send them all out of prison " better men and women, physically and morally, than when they came in." Yet is there not some cant and hypocrisy about a phrase like this? May we expect to see queues of repentant evildoers waiting hopefully at the prison gates for their turn to enter and enjoy a miraculous transformation? How many prisoners really emerge from prison better men and women morally than they were, and would it not be more correct to say that for every one that leaves a better person, two or three, or ten or twenty, leave worse than they were before they entered? " There are in every county of England " large public schools maintained at the expense of the county for the encouragement of profligacy and vice, and for providing a proper succession of housebreakers, profligates and thieves. They are schools, too, conducted without the smallest degree of partiality or favour; there being no man (however mean his birth, or obscure his situation) who may not easily procure admission to them. The moment any young person evinces the slightest propensity for these pursuits, he is provided with food, clothing and lodging, and put to his studies under the most accomplished thieves and cut-throats the county can supply." (Sydney Smith, *The Edinburgh Review*, 1821.) " This is a perfectly true picture," continues Sydney Smith, " of the prison establishments of many counties in England, and was so, till very lately, of almost all." If there is any truth in the descriptions of prison life at the present day given by ex-prisoners, the picture has remained to some extent unchanged, in spite of all the efforts of the reformers. Nor is it possible to see how it can be erased. The majority of prisoners are of weak character and low mental power, but many are vicious and a few are irredeemably vicious. There is nothing to wonder at if the weak are corrupted by the vicious, and the less vicious by the more vicious. The only way to prevent this from happening would be by completely isolating the prisoners from each other, a method which was advocated a hundred years ago but which would be rejected as intolerably cruel nowadays. The tendency indeed of modern prison administration is to allow progressively more freedom of association between prisoners outside working hours during the course of their sentences. It is the deliberate policy of the Prison Commissioners, contrary to former ideas, to mix first offenders in the training prisons with a minority of recidivists, in the belief that the majority are rather likely to influence the minority for good than to suffer harm themselves.

Even if first offenders were strictly segregated, it would not mean that the chances of contamination were eliminated, since of course the first offender may be a man who has previously been luckier than he deserves and is not necessarily one of hitherto blameless character. Nor can prisoners be judged always by their behaviour in prison, as seen by the prison authorities. It is well known that those whose conduct is most satisfactory inside may relapse the soonest when they gain their freedom, because they are unable to resist temptation, while the more cunning types are capable of concealing their real depravity in order to gain the privileges open to well-behaved prisoners.

The truth seems to be that imprisonment is inseparable from corruption by its very nature, not to speak of the other disadvantages which it entails, such as the stigma which it is bound to leave and the difficulty which faces prisoners of establishing themselves in ordinary life when they get out. If this is so, there are certain consequences that follow. In the first place, imprisonment (and the same thing applies to Borstal training, though with less force, since there is more hope of reclaiming youthful offenders) should be regarded as a last resort, to be used only if any other method of dealing with an offender would be plainly inadequate for the protection of society. This is a view which is widely accepted today, though not always put into practice. Another conclusion that may be drawn will not be so popular, namely that if short sentences of imprisonment are to be avoided where possible, long sentences are to be avoided even more, since the arguments against short-term imprisonment are obviously stronger in the case of long-term imprisonment. It is here that the modern pre-occupation, not to say obsession, with training and rehabilitation of prisoners seems to go astray. Nothing, we are told, can be achieved by a short term of imprisonment to reform the prisoner. "It is quite impossible," declares one author, "that the prisons should be able to exert any effective reformative influence in so short a time [*sc.* up to six months], nor is the fear of a short sentence likely to have any deterrent effect. It is a startling but incontrovertible fact that with the majority of prisoners imprisonment serves no useful purpose either from the angle of deterrence or reformation. It is only an indication that society disapproves of a certain type of behaviour." (Winifred A. Elkin, *The English Penal System*, p. 125.) The author points out that short-term prisoners make demands on prison staffs out of all proportion to their numbers, since reception in prison is a complicated business involving many interviews. Again, a continual change in the prison population means that most of the inmates will be restless either because they have not settled down or because they are expecting early release.

We can understand that prison administrators do not like short-term prisoners, both because they are a nuisance to deal with and also because they are not promising material for the enthusiastic reformer. Which of these two reasons carries the more weight it would be difficult to decide. The implication of the first is that offenders, whom courts think ought to be sent to prison for a short term, should be dealt with otherwise, simply to suit administrative convenience. The implication of the second is that the whole purpose of sending people to prison is to reform them and it is no use sending them at all unless for a sufficient period, whether the interests of society make it desirable to do so or not.

As for the argument that a short sentence has no deterrent effect, this is a curious notion. How many choose to go to prison rather than pay a fine when given the option? Such cases occur, but they must be very rare, though we have no means of distinguishing those who cannot pay from those who will not pay. What is clear is that the threat of jail is a more effective way of making the reluctant pay up than any other. What can be meant then by saying it is not a deterrent? To most of those who have never been in the dock before, it is the fact of imprisonment that matters, since it is in itself calamitous or even ruinous, and not whether it is for six months or for twelve months. And for those who are so used to the inside of a prison that the effect on them of being sent there is slight, a long term cannot be much more of a deterrent than a short one. Of course there are others to whom the length of the sentence matters a great deal. But the more privileges they know they can obtain during the course of their time in prison by persuading those in authority that they are in process of rehabilitation, the less the length of the term will deter them.

Condemnation of short-term imprisonment has now become an official dogma. Thus we read in "The Scottish Prison System," a report of the Scottish Advisory Council on the Treatment and Rehabilitation of Offenders (1949): "We wish to be equally emphatic in expressing our opinion about the ineffectiveness of short-term prison sentences. . . . We have been impressed by the unanimous opinion given to us by prison governors and other persons whose work brings them into close touch with prisoners, that the short-term sentence is harmful to the offender and a waste of public money. . . . We hope that such short sentences will in future only be imposed when the court is fully satisfied that no other method of dealing with the case is possible in the interests of the community and of the offender."

The hope here expressed is unexceptionable. But are short sentences only to be discouraged and not also long ones? It may unfortunately be the case that prison sentences, short or long, are harmful to most prisoners. Can there be any ground for asserting categorically that a sentence of six months or under is more harmful than one of nine or twelve months? Prisoners, like other human beings, differ infinitely from one another, and, assuming that they can be reformed by training at all, the period required probably varies from a few months to many years. We should imagine, however, that in the average case a useful result could scarcely be expected under a year, which means, allowing for remission, a sentence of eighteen months. That appears to be the minimum qualifying sentence for admission to a training prison.

A waste of public money? We may doubt whether the opinion of prison staffs should be decisive on this point. Public money is spent on prisons in order to prevent crime by showing that it does not pay, and not primarily in order to rehabilitate criminals, as the very existence of summary courts with limited powers of punishment shows. Take the case of a man who drives a car when he is disqualified, or commits another offence when on probation for a previous one of the same kind, or wilfully evades payment of a fine, or persists in committing petty thefts or breaches of the peace. What is to be done in cases of this sort, and numerous others that occur every day in any summary court, but impose a short prison sentence? To impose a long one, even if a summary court had the power to do so, would be both unnecessary and unjust, and certainly not the best way of saving expense to the public. Yet if the courts could not make use of the weapon of imprisonment they might almost as well be closed down.

A sentence of imprisonment cannot be said to be ineffective when it tends to prevent the offender himself from repeating his offence or, what is more important, tends to deter other people from imitating him. There is every reason for supposing that imprisonment, even though it is short and to a large extent irrespective of its length, has such a tendency. If the short sentence is not a more effective form of punishment than it is, the blame, it might be suggested, lies partly on those who administer the prison system. It is only too obvious that administrators and staffs regard the short-sentence man as merely a nuisance, and that interest and attention are concentrated almost wholly on the medium and long-term prisoners, who alone, it is believed, optimistically or not, are capable of rehabilitation. Yet the new system of detention centres for youthful offenders between seventeen and twenty-one years of age provides an intensive period of training under rigorous discipline of ten weeks only. If this is thought appropriate and proves successful for young adults, then surely arrangements might be made for giving older short-term offenders some kind of intensive training, no doubt along different lines and adapted to their various mental and physical capabilities.

A more realistic view than in the 1949 report is taken by the Scottish Advisory Council's recent report on the use of short sentences (1960). It is admitted that short-term imprisonment is not without some advantages and has a definite and necessary place in our criminal law. But more stress is laid on its disadvantages, and the opinion is expressed that it is too widely used in present practice. One of the Council's conclusions, based on a study made by a research unit, is that short-term sentences of imprisonment are less effective in preventing recidivism than other ways of treating offenders.

This study, which is appended to the report of the Advisory Council, is not as clear as might be wished. It appears to show statistically that, certain variables being excluded, short sentences are followed by a larger number of re-convictions than either fining or longer sentences, and the claim is made accordingly that the former is an unsuccessful and the latter are successful forms of treatment. It is doubtful whether the use of words like "successful" and "unsuccessful" is justified in this connection, and whether *propter hoc* is not being inferred from *post hoc*. Every summary court is familiar with the depressing case of the offender who has a schedule of perhaps as many as twenty or more convictions for dishonesty of various kinds, dealt with in nearly every instance after the first one or two by a short term of imprisonment. Perhaps courts are wrong not to vary the sentence more often and try probation or a fine or a deferred sentence, however useless it may seem. They sometimes do so, with the usual result that the offender appears again on another charge, after a rather shorter interval between charges than on the last occasion, and once again the court falls back on imprisonment for a few months. Cases like this may perhaps lead to the fallacious conclusion that short sentences are a cause of re-convictions. To prove that recidivism is caused by any particular form of punishment would be a very difficult task, and the evidence for it is entirely insufficient. Of course, a longer term of imprisonment gives a persistent offender fewer opportunities of appearing in the dock, and in so far as any punishment deters him, a long term will presumably have more effect than a short one.

If the protection of society were the only consideration, then it would be easy to deal with offenders of this type by locking them up for years. Yet surely justice to the offender requires that the sentence should not be out of all proportion to the gravity of his offence. It would be small consolation to him to be told that while he was deprived of his liberty he might be trained to be a good citizen, though this might salve the conscience of the judge who sentenced him. There is much to be said for the recommendation by the Advisory Council that the present limit to the power of imprisonment of summary courts is too low, and that it should be raised to twelve months in the case of a second or subsequent offence of violence or dishonesty. Can, however, a term of nine months, which is all a twelve months' sentence means in practice, really be sufficient for rehabilitation, as is hopefully suggested in the report?

A recommendation that the common law limit to fines imposed by a summary court should be raised is nothing if not timely. The Advisory Council boldly propose that the existing maximum of £25 should be increased to £250. They are certainly correct in believing that at present some persons are sent to prison purely because the maximum fine is wholly inadequate. Among their other recommendations for the purpose of reducing the number of short prison sentences are a greater use of probation and express power to defer sentence for a discretionary period. The latter suggestion is welcome, since apparently the practice of placing offenders on deferred sentence is of questionable competency. But the Advisory Council are strangely hesitant about the practice. They think that on the whole it may occasionally be a suitable alternative to an immediate short sentence of imprisonment, but that it lacks the possibilities of character-training afforded by probation, and they are not convinced that as a general rule deferment with an implied condition of restitution by the offender is right in principle. From his point of view, the same effect could be achieved by a fine to be paid by instalments, and they also express the view that the criminal courts should not " be saddled with the duty of obtaining recompense for the party which has suffered loss." Why not? It may well be thought that, where the victim of a crime has suffered loss, society has failed in its duty of protecting him and should see to it that he is compensated if the criminal is able to make restitution. We might go a step further, and argue that, if the criminal cannot compensate the victim, then the State ought to.

In any event, a power to defer sentence for the purpose of restitution does not imply a duty imposed on the court to obtain compensation for the injured party. It can only be a discretionary power, appropriate in certain circumstances and not in every case where the victim of a crime has sustained loss. The offence, for example, may be one of a kind that requires the imprisonment of the offender, or the amount lost by the victim may be unascertainable or too small. On the other hand, where restitution is appropriate it gives the victim a remedy which he would otherwise lack, since there are few offenders whom it is profitable to sue. At the same time, to compel an offender to make restitution to his victim brings home to him directly the harm he has done in a way that a fine cannot do, besides having some practical advantages over fining. Of all methods of dealing with minor offenders, the deferment of sentence, with or without a condition of restitution, is surely one of the best, and it is a pity the Advisory Council are so tepid about it. For adults especially it may often be more suitable than probation, of whose possibilities in regard to the training of character we may in some instances be faintly sceptical. One might think that in general to make an offender himself responsible for his continued good behaviour, or for making restitution, was at least as well calculated, in the case of an adult, to improve his character as to place him under the supervision of a probation officer. But this depends on the offender personally and on the circumstances of the case. Nobody who is acquainted with the work of probation officers will want to cast the slightest doubt on the value of the help they give both to offenders and to the courts.

Whatever criticism may be made of some parts of the recent report of the Advisory Council, we must agree that they seem to be entirely justified in their main contention, that short-term sentences, which amounted in 1958 to 92 per cent. of all prison sentences, are too widely used and ought to be reduced in number. It is disquieting to find that while in Scotland short-term sentences were 4·5 per cent. of all disposals, the rate in England and Wales was less than half that figure. It is even more disquieting that as many as 34 per cent. of all those received into prison were fine defaulters, and that the proportion of fines which led to imprisonment is about four times as great in Scotland as in England. This can only mean that a large number go to prison not because they will not pay the fine but because they cannot pay it, a result which must be presumed to be contrary to the intention of the sentencing court which gave them the option of a fine.

Summary courts in England are no longer allowed to fix an alternative prison sentence at the same time as they fix a fine. If an offender does not pay, instead of automatically going to prison, as he may do in Scotland, when the time limit expires, he must be brought again before the court and the reasons for non-payment investigated before sentence of imprisonment is passed. As a result of the introduction of this procedure in 1935 the number of imprisonments in default fell from an average of 11,000 yearly to 3,000 in 1947. This seems to be a conclusive argument for the introduction of a similar procedure in Scotland, as is recommended by the Advisory Council.

At the same time, they are perhaps a little too much disposed to admire English practice in other respects. Thus the proportion in England of sentences of over six months' imprisonment to all disposals was twice as high in 1958 as in Scotland, at 1 per cent. compared to 0·5 per cent. The Advisory Council imply that this comparison, and the fact that average sentences passed by English courts for housebreaking, for instance, are about three times as long as in Scotland, show that we are behind time in our treatment of crime. More severe sentences have not prevented the recent steep increase of serious crime in England, while they are no doubt a consequence of it, and they are largely responsible for the deplorable over-crowding in English prisons. We do not need to imitate these measures and should in general be rather cautious about some of the ideas evolved on the subject of crime and its treatment. It is one of the fields where well-intentioned but ill-balanced theorists are most abundant.

SUMMARIES

By S. G. Kermack, C.B.E., M.A., LL.B., Advocate, Sheriff-Substitute of Renfrew and Argyll at Oban

American Law

Oklahoma Law Review, February 1960: "Modern Sentencing Procedure," by Judge Eugene Rice.

American Bar Association Journal, January 1960: "Preventing Drunken Driving," by Dr. Horace E. Campbell, Colorado. In the February number, "Recent Trends in Criminal Law," by George Dant, Assistant Attorney-General of the U.S.A.; "Traffic Courts: The Judge's Responsibility," by Judge Levin, California. In the March number: "Eavesdropping and the Law," by Anthony P. Savarose, Jr., New York Bar.

New York University Law Review, February 1960 is devoted to its Annual Survey of American Law 1959, as is its March number.

American Bar Association Journal, April 1960 presents the two sides of the Federal Diversity Jurisdiction controversy, by William L. Murbury of the Maryland Bar and Professor Meador, University of Virginia.

New York University Law Review, April 1960: "The Bill of Rights," a lecture by Associate Justice Black of the Supreme Court; "The Madison Heritage," by Irving Brant, Madison's biographer; "The Right to Communicate" (as a group right), by Professor Leon Green, Texas.

New York University Law Review, May 1960: "Arbitration—What is it?" by Professor Wesley A. Sturges, Miami Law School, from a forthcoming treatise.

Connecticut Bar Journal, December 1959: "The Public Servant" (licensee or invitee), by Leo V. Gaffney.

American Bar Association Journal, May 1960: "The Right to Treatment" (mental hospitals), by Morton Birnbaum, M.D., of the New York Bar.

Common and Statute Law

Modern Law Review, March 1960: "Unit Trusts," by H. A. J. Ford, University of Melbourne.

Canadian Bar Review, May 1960: "Enforcement of Competition in the United Kingdom," by Richard Gosse.

Modern Law Review, May 1960: "Effect of Penal Legislation in the Law of Tort," by Glanville Williams, LL.D.

Public Law, Summer 1960: "Restrictive Agreements and the Public Interest," by Professor B. S. Yamey, University of London.

COMMONWEALTH LAW

Public Law, Spring 1960: "Case against Federation in Central Africa," by Colin Leys: "Constitution of the State of Singapore," by Professor O. Hood Phillips, Birmingham.

Canadian Bar Journal, February 1960: "Bulk Sales in Ontario," by Fred M. Catzman, Q.C.

Canadian Bar Review, March 1960: "Subordinate Legislation," by Elmor A. Driedger, Q.C., Assistant Deputy, Ministry of Justice, Ottawa; "Does Canada need a Code of Evidence?" by J. D. Morton, Toronto; "Gross Negligence and the Guest Passenger," by W. G. MacArthur, Montreal.

Canadian Bar Review, May 1960: "Some Aspects of Canadian Constitutionalism," by Dean Ivan C. Rand, University of Western Ontario; "Quashing of Municipal By-Laws," by Eric Todd, University of British Columbia.

British Tax Review, March–April 1960: "Australia—Tax Code of a *Developing Economy*," by Alan G. Davies.

COMPARATIVE AND FOREIGN LAW

The *Revista Jurídica de la Universidad de Puerto Rico*, March–April 1959; "A Glimpse at Latin American Law," by Dean Manuel Ramos, University of Puerto Rico: "El Fideicomisso Moderno," by Ricardo Alfaro and Rufford Patton.

Modern Law Review, March 1960: "Blasphemy in Irish Law," by Paul O'Higgins, Cambridge.

Revue Internationale de Droit Comparé, January–March 1960: Consecrated principally to a symposium on Comparative Law in relation to the European International Organisations, in four essays: "The European Communities and the Reconciliation (rapprochement) of Law," by Professor Bärmann, Mayence; "Comparison and Reconciliation of Legislation in the Common Market," by Professor Monaco, Rome; "Formation of the Rule of Law in the European Communities," by Professor Dumon, Brussels; "General Conditions of Sale in the Economic Commission for Europe," by Professor Tunc, Paris.

Modern Law Review, May 1960: "The Validity of Judicial Decisions in the Nazi Era," by H. O. Pappe, Australian National University; "Free Trade Association and Common Market compared," by D. G. Valentine.

Public Law, Summer 1960: "La Communauté" (Greater France) by Professor P. F. Gonidec, Rennes.

CONFLICT OF LAWS

Canadian Bar Review, March 1960: "Enforcement of Foreign Judgments in Canada," by Kurt H. Nadelmann, Harvard.

British Tax Review, March–April 1960: "Estate Duty in Testamentary Trusts of Foreign Lands," by Valentine Latham Korah.

ENGLISH LAW

New York University Law Review, May 1960: "Family Provision on Death in English Law," by Professor F. R. Crane, University of London.

Public Law, Summer 1960: "The English Prosecution," by Christopher Williams, Chief Constable of Huntingdonshire and the Isle of Ely.

The Oxford Lawyer, Trinity 1960, offers an issue of short articles on suggested reforms of the law by distinguished writers, of interest primarily though not exclusively as regards English doctrines about abortion, suicide, etc.

INTERNATIONAL LAW

Modern Law Review, March 1960: "International Law and Human Rights," by D. A. V. Boyle, Barrister-at-Law.

American Bar Association Journal, January 1960: "International Tribunals," by Professor Louis B. Sohn, Harvard University; "Report of the Commission on Civil Rights," by Robert G. Storey of the Texas Bar. In the February number: "The World Court and U.S. Domestic Jurisdiction," by Edmond J. Clinton.

American Journal of International Law, January 1960: "Enforcement of International Decisions," by Oscar Schachter, New York, of the Board of Editors; "Maintenance of Public Order at Sea," by Myres S. McDougal, Yale Law School, of the Board of Editors, objecting to proposed changes as to Flags of Convenience.

Canadian Bar Journal, April 1960: "Sovereignty in Outer Space," by Henri T. P. Binet, Montreal.

American Journal of International Law, April 1960: "Indonesian Nationalisation Measures before Foreign (Dutch and West German) Courts," by Martin Domke, New York University; "Sanctions in International Law," by Josef L. Kunz of the Board of Editors, dealing with sanctions for breach of International Law other than armed attack; "The Antarctic Settlement of 1959," by Professor Hayton, San Carlos de Guatemala University.

New York University Law Review, May 1960: "National Character of a Ship: the 'Genuine Link' Principle," by Ben Vinar, of the Review Staff.

Canadian Bar Review, May 1960: "Future of the Law of Outer Space," by H. Courtney Kingstone, Ottawa; "A New Concept of the Rule of Law," by J. T. Thorson, Hon. President, the International Commission of Jurists.

American Bar Association Journal, May 1960: "The World Court and the Connally Reservation," by Roy E. Willy of South Dakota Bar.

JURISPRUDENCE

New York University Law Review, April 1960: Professor Roscoe Pound on "Discretion, Dispensation and Mitigation." The same *Review*, May 1960; "The Existence of a Legal System," by Graham Hughes, University College of Wales.

LITERATURE AND LAW

The American Bar Association Journal continues in its April 1960 number its interest in the Shakespeare controversy and announces its readiness to continue doing so. The authors are Commander Martin Pares, R.N., and Arthur E. Briggs of the California Bar. Also " Sir William Gilbert—Lawyer and Librettist," by Weston P. Hatfield of the North Carolina Bar. The May and June numbers plunge even deeper into the Shakespeare controversy and the attention of those interested is drawn to them without actual specification.

MEDICINE AND LAW

The Medico-Legal Journal, Part I, 1960: " Projected Changes in Mental Health Laws," by Dr. Harold Beccle, Springfield Hospital; " Accidental Carbon Monoxide Poisoning," by A. Keith Mant, M.D., Lecturer in Forensic Medicine at Guy's and St. Mary's.

SOCIAL AND POLITICAL SCIENCE

Public Law, Spring 1960: " Reflections on the General Election," by Bernard Crick, London School of Economics.

Western Political Quarterly, March 1960: " Public Opinion and Political Theory," by David W. Minar; " Municipal Autonomy," by Benjamin Baker; " Legislative Behaviour Research," by Norman Meller.

Periodicals also Received: *Bundesgesetzblatt*, *La Justícia* (*Mexico*), *Las Democracias Latino-Americanas*, *Law Journal*, *Jus* (*Milan*), *Revista de Derecho y Ciencias Politicas* (*Lima*), *Revista del Foro* (*Lima*).

RECENT LITERATURE

The Criminal Prosecution in England. By Sir Patrick Devlin. 1960. London: Oxford University Press. 15s. net.

This book, an account of English criminal procedure, is based on lectures by Mr. Justice Devlin, delivered at Yale in 1956. In his preface the learned judge explains that there are many matters on which it would be improper for him, as the holder of a judicial office, to comment. There remains, however, much that will render his account valuable to foreign lawyers.

The Scottish practitioner, technically a "foreign" lawyer, will possibly have the not unfamiliar experience of reading page after page of a disquisition which might almost have been written of his own law, only, however, to be brought up by some conception or institution that is totally foreign to him. But even in fields where there is considerable similarity between the two systems minor points of difference are found not infrequently. Thus there is a general similarity between the Scottish and English ideas about evidence of admissions by accused persons, but they are certainly not identical, notably in the English practice of definitely allowing questions which are designed to clear up obscurities. There is an excellent account of the Judges' Rules and how they came into existence. Also in the chapter on interrogation the author gives an interesting and enlightened explanation of such police "pressure" as has been proved to exist in England. In the course of which, incidentally, he makes a somewhat acid reference to the well-worn cliché about the acquittal of the ninety-nine guilty men, which may be not unacceptable to some of his readers. On pages 54 *et seq.* there is a clear account of the law as regards "wire-tapping," about which a good deal of nonsense has been talked.

The same general similarity between the two systems is noticeable in the chapter on arrest, bail and detention. The account of English reasons for refusing bail is interesting and in particular it may be noticed that the existence of a criminal record is not *per se* mentioned as a ground for refusing bail as is now clearly the case in Scotland. The English practice appears to be the more logical. In this connection an account of the Brighton police trial will be found interesting.

The last chapter in the book is entitled "The Legal Process." It is that which Scottish readers may well find the least *sympathique*. Probably no Scots lawyers will ever fully comprehend, far less applaud, the English mode of launching criminal prosecutions. The grand jury once gone, who takes its place as the committing power? Most people know that it is the magistrates. But fewer know that "the whole function has been handed over to the judge; the prosecutor instead of preferring a bill to the grand jury prefers it to the judge and applies for his leave to file it. . . . But the law also provides that an indictment may be filed without the leave of the judge if it follows upon a committal by the justices . . . in practice the latter method is almost invariably used." And this is the well-known magistrates' inquiry—the laborious proceeding where the evidence is taken down in long-hand and where the whole story is made available to the public before the trial. This chapter explains the efforts which have been made, without success, to abolish or improve the arrangement. It is certainly odd to contrast it with the ferocity of the sentences passed on newspapers for contempt of court in publishing comment on a trial or the like. The learned author does not allude to our system of public prosecution, nor does he enlighten the reader as to the question " who is really the prosecutor in an English trial? "

Within its limits the book is interesting and authoritative and its contents worthy of an index.

A. D. G.

Not Proven. By John Gray Wilson, Q.C. 1960. London: Secker & Warburg. 25s. net.

This book, by the author of *The Trial of Peter Manuel*, consists mainly of accounts of four cases of murder in which the verdict was not proven. The cases discussed are the three classic not proven cases—Madeleine Smith, Monson and Merrett—and the case of Christina Gilmour in 1844 which, although one of Roughead's *Twelve Scots Trials*, is little known. Miss Gilmour's case presents two remarkable features—she was a young and respectable girl who was acquitted of poisoning her husband by repeated doses of arsenic, and she was the first person to be extradited to Scotland from the U.S.A., whence she had fled via Liverpool. As a poisoner she was overshadowed by the incomparable Madeleine Smith, and as a fugitive by the unfortunate Oscar Slater; but in her own quieter way she appears to have been a character to be reckoned with.

Mr. Wilson's approach to these cases is severely factual. Although he indicates his own views at the end of each chapter he does not allow it to affect his presentation of the case, nor does he indulge in any " fine writing." As a result his accounts are somewhat colourless and lacking in human interest—he does not, for example, make Madeleine Smith live for the reader as did Miss Jesse in the introduction to her edition of the trial. Nor can it be said that Mr. Wilson sheds new light on any of the cases except, perhaps, in the importance he attaches to the likelihood that Madeleine Smith had to get rid of L'Angelier and not merely of his letters because she was, or believed herself to be, married to him by promise *subsequente copula*. What Mr. Wilson does is to set before the reader a clear and concise statement of the essential facts of each case in such a way as to enable him to reach his own conclusion on the guilt or innocence of the subject. His technique is to sketch in the background of the case, set out the main facts, supplement them with extracts of the evidence, and then present the arguments for and against guilt by way of somewhat lengthy extracts from counsel's speeches and the judge's charge. Each chapter concludes with an interesting review of the the later life of its subject. All this Mr. Wilson does well, and it is unlikely that any conclusion formed on the basis of the information in this book would be altered by reading the evidence itself.

There are suggestions however that Mr. Wilson is trying to do something more than retell old tales. The book opens with a short essay on the verdict of not proven, which includes a useful résumé of its history. Mr. Wilson favours the retention of the verdict, mainly because he feels that the not guilty verdict should be reserved for those cases in which the jury are satisfied that the accused's innocence has been proved. In practice the existence of the not proven verdict may often have this effect, although there is no authoritative definition of the difference between not guilty and not proven. In so far as the not proven verdict does have this result its effect is unfortunate. One does not like the idea of a second class acquittal of the nature of " not guilty, but don't do it again "—our criminal procedure is not designed to facilitate proof of innocence, and it is not a good thing to stigmatise a man for having failed in such proof. There is much to be said for abolishing the not guilty verdict, but little for retaining both it and not proven. If we are to retain them, perhaps not proven should be restricted to those cases in which there is no doubt of the accused's guilt but a rule of the law of evidence renders his conviction impossible.

Finally, the publishers invite us to consider what would have been the verdict had the cases treated been tried in England. Mr. Wilson himself does not deal with this—he merely indicates that he thinks all except Monson were guilty. It is difficult, however, to see how an English jury could have convicted any of the four accused dealt with, given at any rate the same brilliant defending counsel, and the same anxiety by the Bench to avoid conviction. Surely an English jury would have been susceptible to the charms of the two poisoners and have found sufficient gaps in the Crown case to justify them in their desire to acquit. They might have jibbed at declaring Monson not guilty, but the mystery surrounding the murder itself and the earlier attempt at drowning, and Monson's motive for keeping the victim alive till he was twenty-one, would have influenced them as they have influenced Mr. Wilson, and prevented conviction. As for the egregious Merrett, we must remember that despite his depraved appearance the 1927 jury were faced with an orphan youth and not Ronald Chesney.

Not proven was the appropriate verdict in all the cases—except perhaps that of Gilmour—not because of doubt about actual guilt, but because the Crown case, for one reason or another, was not quite good enough, or at least not good enough to withstand the eloquence of defending counsel and the caution of the Bench. That being so, the verdict in England would have had to be not guilty, as it was in the case of Adelaide Bartlett to which Mr. Wilson refers in his opening chapter.

G. H. Gordon.

Some Problems of the Constitution. By Geoffrey Marshall and Graeme C. Moodie. 1959. London: Hutchinson & Co., Ltd. 21s. net

The main intention of this book, according to the preface, is to bridge the gap between " the works of political historians on the one hand and those of lawyers writing for lawyers on the other.'' In form it is a collection of essays upon familiar major issues: Convention, Ministerial Responsibility in relation to Crown, Parliament and the Courts, Ministers' Powers, Members, Ministers and the People, and a final chapter which gathers up subsidiary matters such as the office of Deputy Prime Minister, and position of the Law Officers, or Suez.

From its main purpose the book is general, and yet, if it is to be the intended bridge, parts of it are necessarily technical. It takes Dicey as a starting point, but the argument is based upon the most modern material; the *Strauss Case* on privilege or the *Waters Tribunal* are but examples, and many others could be given in relation to the central government. Material has been widely collected, legal and other periodicals are cited, newspapers and biographies have been considered in addition to the more familiar official sources. Not all the issues discussed will be familiar to all the readers for whom the book is intended, or who could profit from reading it, and whether familiar or not the problems discussed in the main body of the book are of such importance that fresh and argumentative discussion of them, as here, is always valuable. Some of the minor issues raised in the last chapter are not of this order and had perhaps best been omitted. On the major ones, however, the treatment is vigorous and the comments are down to earth.

The book thus contains much that is useful. There is also much that is debatable. In one sense this is inevitable and intended. The authors have not set out to write a safe traditional descriptive book, but to stimulate thought on certain matters. This they certainly achieve. In another sense it may not have been intended. Some of the arguments are, perhaps, not as cogent, either generally or in detail, as they appear at first sight. The authors display a strong desire to have matters regulated by fairly precise and minute rules. The desire is understandable but such rules could create further greater problems. Words being what they are, one cannot prescribe in advance suitable rules of conduct for all possible combinations of circumstances. In the unforeseen circumstances which must sometimes arise detailed regulation may prove to be an obstruction, and in ordinary circumstances it may give a false feeling of security. There are advantages in a situation governed by generally understood, but nevertheless slightly uncertain, rules in whose application governors and governed are constantly driven back to fundamental principles rather than being concerned with technicalities. It is an historical accident which allows us to enjoy that type of constitution, and losses from an alteration could be at least as great as any gains.

In relation to some of the detail of the book, there are more doubts. While here the subject-matter may be technical, yet a full understanding of it and clarity of expression about it are important. The argument, for example, about precedent in relation to convention suffers from an inherent weakness in being based upon a comparison of precedents which support conventional rules with ordinary legal precedents. The word precedent is being used to describe two quite different things. No "instance" in the sense of an event creates a precedent in law; what alone has any binding force is the principle overtly applied in the decision. In most cases in relation to convention

" the precedent " is something quite different. It is the instance or event of which there is probably a bare factual record with no full authoritative contemporaneous public announcement of explanatory principle. Upon what principle George V sent for Mr. Baldwin rather than Lord Curzon was not disclosed until more than twenty years afterwards. Yet the " precedent " had had its formative effect on constitutional doctrine. To argue about precedent in the conventional setting using analogies from precedent in the legal setting while neglecting this fundamental difference is not useful. Again in the same chapter the discussion of the consequences of the possible enactment of conventions is unreal without at least some mention of the rules governing a title to sue. So far as the most important conventions are concerned, their enactment would not necessarily give anyone a title to sue and the advantages which the courts are said to derive from the fact that the important rules are of a " non-legal " character and which it is argued might be prejudiced by such enactment would persist, simply because the rules, whatever their character, would not present a justiciable issue (in a precise legal sense, and not in either of the senses used by the authors at page 90). Though the authors suggest that there are limits to judicial activity, the limits are probably much narrower than those hinted at in these suggestions.

Such things would not matter were not the authors so anxious about the meaning of other people's words. Even outside the narrow field of law their argument is not always close. When on page 142 they advocate the creation of an official akin to an Ombudsman " with suitable precautionary modification to exclude inquisition into higher reaches of policy," one wonders what they mean " precisely " by the higher reaches of policy. On the preceding page they have aptly commented on Lord MacDermott's proposal of a committee to which administrative problems involving individual rights could be referred that, " If the matter is sufficiently important to warrant the attention of the Minister he is not likely to be prepared to defer to distinguished amateurs," adding that if a Minister did so defer the Commons would be ready with charges of evasion of responsibility. The blunt practical and political answer to their own proposal is that their own comment on the alternative proposal covers anything of policy, high or low, that ingenuity can convert into the foundation of a Parliamentary battle, and whether the policy is high or low the riposte which the authors indicate would be made if the suggestion were adopted. The argument on page 141, if there valid, is also valid on page 142. So, too, one wonders whether in their concern that the realities of Parliamentary control should be considered, and taken into account in courts, they themselves have always considered the reality of parliamentary " intending." Speaking of customary finality clauses they comment, " few laymen reading these words would feel any doubt that Parliament had intended to stop up recourse to the ordinary courts," and then proceed to criticise courts for not giving the fullest effect to such phrases. Here there is at once neglected a whole history of at least two centuries of statutory interpretation which, if it is studied, may well alter the picture entirely. With this the layman may reasonably not be familiar, but those who draft or apply legislation will or should be, and at least some account should be taken of that background before the dictum of Denning L.J. in *Barnard* v. *National Dock Labour Board* [1953] 2 Q.B. 18 is held up to easy criticism. Again, on the same score, if judges are to be criticised for statements like that of Lord Birnam in *Magistrates of Ayr* v. *Lord Advocate*, 1950 S.C. 102, 107; 1950 S.L.T. 257, 261: "Parliament has not delegated to the Secretary of State but has expressly reserved to itself the final decision," at least two points should be made. If the judges neglect the wording of the statute they must declare these words meaningless, though the authors, in the passages just quoted, take the judges to task for making for a lesser (and probably non-existent) inroad into the words of an Act and into Parliamentary "intent." Moreover, if the quest for "reality" is to be carried out in relation to courts as well as Parliament, some mention might be made of Lord Cooper's article in *Public Administration*, Vol. XXXII, 165, and of his reservations in 1947 S.C. 605, 620; 1948 S.L.T. 45, on the decision in *Pollok School* v. *Glasgow Town Clerk*, 1946 S.C. 373; 1946 S.L.T. 365 (which is quoted).

Indeed, one feels that the law and lawyers are often somewhat cavalierly treated. It is not true to assert that remarks such as that of Professor Hamson that the judges have abdicated control, require extensive psychological and sociological research before they would be justified. All that is necessary is a reading of the Law Reports. (Without these modern aids one could incidentally perfectly well write "The Constitutional World of"—Mr. Justice Holmes, Brandeis, Harlan (*père*), or whom you will.) To say that law officers exercise governmental, administrative or political discretion for which they are answerable to Parliament and to suggest approval of Parliament exercising control by tribunals of inquiry is at the same time to neglect the whole modern tradition of the Crown Office in Scotland, and to strike down (for what reason is not clear) the Procurator Fiscal system and all the safeguards it entails.

These matters have been argued at length for two reasons. In the first place, while the book is to be welcomed for its lively comment which stimulates, many passages should be subjected by the reader to analysis as close as the authors devote to the writings of others. In the second place it may be that one has picked too much on legal aspects. Each is no doubt careful of his own. Yet there is perhaps more to it than that. Lawyers do not write only for lawyers. They write law, and let him read that will and can. The state and its working are matters of law and precision about legal techniques, legal habits, legal institutions and so forth, is fundamental to any constitutional discussion which is not upon the plane of pure political theory. To neglect that precision is to diminish the value of criticism and to weaken the strength of proposals. It certainly behoves lawyers to look at their institutions and rules in the light of criticism, but it also behoves the critics to look at the law.

J. D. B. MITCHELL.

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JURIDICAL REVIEW

EXCHEQUER AND COUNCIL IN THE REIGN OF JAMES V

"ALL civil actiounis, clames and contraversies concerning the Kingis propertie, quhairof compt is maid in the chekkar, aucht and sould be discussit befoir the Auditouris of the chekkar and befoir na uther Judge within this realme. . . . And also, the Auditouris of the chekkar and nane utheris within this realme ar Jugeis competent in all actiounis and contraversies anent allowance and comptis concerning the Kingis houshald." For these propositions Balfour cites cases of 1529 and 1533.[1] Taken literally they would imply that the Exchequer in James V's reign had already an exclusive jurisdiction in revenue cases, a point to which we shall later return, yet it would be misleading to compare it with the English Court of Exchequer, a permanent court sitting during regular terms and with a permanent staff of judges. Indeed, the "chekkar" was not a court so much as an occasion, the audit of the royal accounts. "*Ordinavimus scaccarium nostrum tenendum*"; "we have ordained our Exchequer to be held," runs the form of the brieve of summons. Several Exchequers might be held within one year, for after the main audit dealing with the accounts of the sheriffs and other receivers of revenue had been completed, special commissioners or auditors, also called Auditors of Exchequer,[2] were appointed for the accounts of the two chief financial officers, the Treasurer and Comptroller and others.

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[1] *Practicks*, 1754, 136.

[2] James V commanded that the salary of the advocate for the poor should be paid by the Treasurer and that "our auditouris of chekker sall allow the samin to him in his comptis," *Acts of the Lords of Council in Public Affairs* (hereafter referred to as *ADC*, iii) p. 435.

The Auditors of Exchequer were, therefore, appointed specially for each audit and their powers ceased once the audit had been completed. It is proposed to concentrate on the main audit or session of the Exchequer, normally held in July and August, to which the term " ordiner chekker " was applied.[3] Balfour has the following reservation to make: " Bot the Auditouris of the Kingis chekkar hes na power to judge or decide upon ony summondis or materis in the chekkar, bot allanerlie upon sic summondis and materis as belangis and pertanis to the chekkar, and to the Kingis comptis to be maid thairin: And gif thay do the contrare in sic caisis quhilk be not chekkar materis, the samin is of nane avail, force nor effect."[4] His authority is royal mandate addressed to the Auditors on July 29, 1527,[5] in which the King complained that they " daylie callis summondis now in our chekker and vaikis nocht apoune the making of our comptis " and ordered them to " cheis certane personis to pas to the tolbuth for calling of all materis that occuris." In the following year the Auditors and Lords of Council " understanding the gret hynder and delay of expeditoune in the chekker be inpportune solicitatioune and calling of summondis and utheris materis quhilk pertenis nocht tharto," made an act by which privileged cases were to be heard in the tolbooth on two days each week, " sa that in tym tocum the chekker be nocht stoppit with syk besynes."[6] A month later even privileged cases were continued " sa that in the meyntyme the chekker may proceide and be endit without inquietatioun of calling of civile actionis."[7] Again, in July 1530 the Auditors were commanded by the King to " call na summondis nor lettres nor deliver na billis tharin bot sa mony as concernis the materis of our said chekkir," an order which they seem to have disregarded.[8]

The impression produced by these quotations, of an Exchequer court refusing to confine itself to its own proper sphere, is soon altered by any study of the original records. No register of acts or decrees of the Exchequer survives from before 1584. The Exchequer rolls, whose main purpose was the enrolment of accounts, also contained certain memoranda relative to the accounts themselves as well as copies of royal charters, precepts and gifts which were ordered to be registered in " oure chekker rollis." [9] Some acts and orders of Exchequer were entered in the blank pages of the " Responde Books " transmitted each year from Chancery to show the casualties for which the sheriffs were required to " answer " (*respondere*) after giving sasine to crown vassals. But the judicial records of the Exchequer must be sought among those of the Council and the " Session " in the volumes of Acta Dominorum Concilii and Acta Dominorum Concilii et Sessionis. An examination of the cases dealt with during the period of the Exchequer, even where the court was " *in scaccario*," or where the list of judges states " *sederunt domini auditores scaccarii*," shows clearly that in most instances decree was given by the " Lords of Council," that is, by the Lords of Council sitting in Exchequer.

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[3] *APS*, iii, 455.

[4] *Loc. cit.*

[5] *ADC*, iii. 262.

[6] *Ibid.*, 277.

[7] *Ibid.*, 281.

[8] *Ibid.*, 332, 338.

It is, of course, quite impossible within the scope of a single article to survey all the cases heard " *in scaccario* " between 1513 and 1542. As any selection might seem arbitrary and misleading, it is proposed to make a detailed examination of all the cases of one year, 1525, which has been chosen because the records are fuller for that year than for any other and because they have been kept in a separate section of the Council register. The " session " in 1525 was unusually prolonged and was not adjourned until August 5, by which time the Exchequer had been sitting for about five weeks, but the sederunts of Exchequer, beginning on July 5, follow the sederunt of Council of August 5 in the register.[10]

The Exchequer Rolls show that the Exchequer began on or before June 30, 1525, and that accounts were rendered on most days, Sundays excluded, up to August 15. In the register, however, there are sederunts only for July 5, 7, 8, 13, 21, 24 and 28, after which there is a gap of a fortnight (apart from August 9, which will require fuller examination) until August 11. The *Domini Auditores Scaccarii* then sat on August 11, 12, 14, 16 and 18, but it should be noted that the audit of the Comptroller's account began on August 14 and therefore the Auditors may have been sitting in virtue of a new commission between August 14 and 18.

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[9] *Exchequer Rolls of Scotland* (*ER*), xii. 266. Registration in the Exchequer Rolls was for preservation only; registration for execution had to be in the Books of Council.

[10] MS. ADC, 35. *ff.* 139–150.

Although there is no list of Auditors in the Exchequer Rolls of 1525, it is most probable that those who were appointed to audit the Comptroller's account had also served on the earlier commission, namely James Beaton, Archbishop of St. Andrews, the Chancellor, Gavin Dunbar, Bishop of Aberdeen, Colin, Earl of Argyle, George Crichton, Abbot of Holyrood, Alexander Milne, Abbot of Cambuskenneth, Robert Forman, Dean of Glasgow, James Kincragy, Dean of Aberdeen, John Dingwall, Chancellor of Aberdeen and Archdeacon of Caithness, James Colville of Ochiltree, Director of Chancery, who himself was appointed to the office of Comptroller on August 14, 1525, Nichol Crawfurd of Oxgangs, the Justice-clerk, and Sir John White, parson of Petcox, to whom we may add Robert Barton of Over Barnton, the retiring Comptroller, who obviously could not be an auditor of his own account,[11] and probably also John Campbell of Lundy, the Treasurer. All those named, including the Treasurer, were also appointed special commissioners for setting the Crown lands of the lordship of Fife on July 4, 1525, although it should be noted the Auditors of Exchequer had a general power of filling vacant leases. Several cases involving tenancies were heard in Exchequer in 1525.[12]

Excluding August 9, eleven sederunts appear in the record between July 4 and August 18. Those of August 11, 12, 14 and 16 do not give the names of those present, merely

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[11] The Exchequer commission of 1543 shows that any quorum had to include the Comptroller. Reg.Ho.Ch. 1319.

[12] *ER*, xv. 557, 559. A decree of commissioners for setting crown lands is printed in *ER*, xiv. 505–506.

" *Domini Auditores Scaccarii.*" The Bishop of Aberdeen, the Deans of Glasgow and Aberdeen, the Comptroller and the Abbot of Cambuskenneth attended upon all the remaining eight occasions, while the Justice-clerk missed one only. On the other hand the Earl of Argyle attended three times, the Archdeacon of Caithness twice and James Colville once, although it is not clear whether " Comptroller " after August 14 refers to Colville or Barton. Those who appear not to have attended at all were the Chancellor, the Treasurer and the Abbot of Cambuskenneth, whose names, however, occur in the sederunts of the main body of the Council, and White, the parson of Petcox. White was an old man, " unable to work as he used to " in his office of clerk of chancery,[13] and although he was reappointed in 1526 he was not active as an Auditor. Among those who attended the sessions of the Exchequer we may make a further distinction between those who were paid for performing special duties and those who were not. In the former class Crawfurd, the Justice-clerk, received £15 for " remaining continuously upon the said chekker," while Kincragy and Dingwall each received payment for their " labours," which consisted of " dictating the rolls." [14] It seems a reasonable assumption that they attended to the routine financial work of the Exchequer, and that when there was no judicial business in Exchequer the Bishop of Aberdeen, the Abbot of Cambuskenneth and the Dean of Glasgow sat with the main body of the Council. These three sat in Exchequer on the morning of August 7 and in Council in the afternoon and the bishop and abbot attended seven sessions and six sessions of the Council respectively between July 5 and August 5, although the dean was only there twice. The Comptroller's constant attendance in Exchequer was essential not only because his presence was requisite for a quorum but also because he acted as pursuer in revenue cases, received money from those accounting and attested previous receipts. The sederunts show, therefore, that six or seven Auditors attended each recorded session but except on August 9 no one who was not an Auditor.

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[13] *ER*, xv. 207.

[14] *ER*, xv. 207, 385.

This last point becomes important when one comes to examine the cases heard, especially in the light of the clerk's use of the terms " Lords of Council " and " Auditors of Exchequer." The first case was that of David Balfour of Burlie against William Scott and Elizabeth Muschett, concerning a tack of the Crown lands of Kinloch in the lordship of Fife; it will be remembered that the Auditors had been empowered to " set " all the lands in that lordship. On July 5 the parties were commanded to compear before the " Auditors " on July 12, bringing their writs, but after a further continuation the " Lords of Council " on July 24 ordained the pursuer to have possession according to the tenor of the last rental, without prejudice to the rights of both parties. In the second case Andrew Mowbray craved that William Lauder of Halton be decerned to relieve him at the King's hands for an annual payment of 20s. furth of his lands of Kirktonhill in Lauderdale, which Lauder and his father had received as sheriffs for twenty-four years. The matter had been referred by the Lords of Session to the Lords of Exchequer who continued the case to allow the defender to compear. Decree was given for the pursuer on July 13 by the " Lords of Council."

In the next two cases Barton, the Comptroller, appeared as pursuer on behalf of the King. On July 8 the " Lords of Council " decerned the alderman and bailies of Cupar to pay £25 to the King and Comptroller for the rent of the mill of Russillis in Fife " occupyit and intromettit with be thaim and restand and dependand on thair hedis, as the fute of the chalmerlanis compt maid in the last chekker proportis "; but a similar decree on July 21 against Malcolm Drummond and David Murray for the rents of lands in the lordship of Strathearn bears to be given by the " Lords of Council and Auditors of Exchequer." Again, on July 28 judgment was pronounced in two actions concerning Crown lands in the lordship of Stewarton. " The Lords of Council and Auditors of Exchequer " decerned that William Schaw of Sornebeg should pay to Elizabeth Elphinston, Lady Dunrod, the violent profits of the lands of Blaklaw " for payment to be maid be the said Elizabeth to oure said soverane lord and his comptrollare in his name of the malis and dewiteis aucht be hir to the Kingis grace thairof," but the " Lords of Council " assoilzied Margaret Boyd, Lady Rowallan, of a claim by Isobel Elphinston and Robert Maxwell of Calderwood, her husband, for the maills of Ormisheuch.

We now come to the sederunts of August 9, 1525. On August 5 the " Session " had been continued until November 3,[15] despite which certain civil cases not concerned with the Exchequer were heard on the morning and afternoon of August 9. Although these sederunts are included with those of the Exchequer they are clearly sederunts of whole Council. Not only are the terms " *in scaccario* " and " *sederunt domini auditores scaccarii* " omitted, but also of the ten Lords sitting in the morning only six were Auditors and in the afternoon a mere two out of nine. The cases were concerned with the parsonage of Kirkmichael, spuilzie at Glenluce Abbey and exemption from the jurisdiction of the Sheriff of Fife ; that is litigation between subject and subject unconnected with the Crown property or revenue. But on August 11 the Auditors themselves were dealing with such matters, namely protests concerning delivery of the heir of Craigiehall and the house of Strathbogie and by the Abbot of Glenluce of his readiness to answer at the instance of the Bishop of Galloway. The same day Lord Somerville constituted procurators in the action moved against him by the Earl of Morton. On August 12 the record again reads " *Sederunt domini auditores scaccarii*," but it was " in presens of the Lordis of Counsale " that the provost of Aberdeen " grauntit him award " to John, Lord Erskine, £100 for which he had taken allowance in the account of the bailies of Aberdeen which had been rendered in Exchequer the previous day. The " Lords of Council " ordained Lord Somerville to deliver the place of Morton to the Earl of Morton and the Abbot of Glenluce repeated his former protest. On August 14 the newly-appointed Comptroller, James Colville, attempted to resign on the grounds of a breach of the conditions on which he accepted office, only to be thwarted by the evasive reply of the Auditors who " allegit that thai had nocht power to make ane comptrollar and sa had na power to discharge him " and referred him to the King and the Secret Council.[16] Two days later the retiring Comptroller, Robert Barton, became bound as surety for Malcolm, Lord Fleming, for payment to Charles Campbell, macer, of what appears to have been a private debt.

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[15] *ADC*, iii. 226.

The last recorded sitting of the Auditors on August 18 dealt with mixed business. The " Lords of Council " gave judgment in two actions concerned with Crown lands, the first brought by Nichol Crawfurd, the Justice-clerk, as lessee of the Loch-miln at the west end of Linlithgow, and the second by the Earl of Angus against William Gray concerning the mill of Dulcrufe, part of Queen Margaret's jointure-lands of the lordship of Methven.[17] An action by Fergus McDowall of Freuch against Margaret McCulloch " tuiching the landis of Sonnenes," previously heard by the Council on July 26,[18] was continued to the third day of the next session. Robert Barton again became bound for Lord Fleming and Nichol Cairncross protested against his removal from the office of custumar of Edinburgh.

The proceedings of August 11 to August 18 clearly show the Exchequer functioning as a vacation court following the continuation of the session. Such a continuation normally preceded the Exchequer; for instance in 1519 the Council continued the session from June 20 to October 20 " becaus it is understand to the saidis Lordis that the chakker is to be haldin in the mene tyme quhilk may nocht gudlie stand with the sessioun " and in 1526 the continuation was " specialie becaus the halding of the chekker quhilk will continew quhill the feryate tyme of hervist." [19] From the general continuation the privileged actions of the King and " strangers " were exempt, and other litigants sought the same consideration. Such actions could be dealt with by the Auditors of Exchequer, not as Auditors but as Lords of Council sitting in Exchequer. Thus in reference to an action of reduction in 1541 it was stated that " the Lordis of Counsale was content to take the said mater in the chekker and to do justice thairintill." [20]

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[16] *ADC*, iii. 227.
[17] *Cf. ER*, xv. 557.
[18] ADC, 35. *f*. 108.

The term " Lords of Council and Auditors of Exchequer " is more difficult to interpret; if, indeed, the framers of the record had any distinction in mind, how is it to be explained? At first sight it might imply a joint session of Council and Exchequer as occurred in 1497, when Lord Ruthven was instructed to raise a new summons of reduction before the Lords of Exchequer " and that the sadis Lordis of the Chekkir certefy the day of the summondis to the Lordis of Consale that thai may avise tharewith and syt with thame the sade day." [21] But the sederunts examined above clearly show that in 1525 only Auditors of Exchequer were sitting. The second possibility is that the distinction lies between two classes of Auditors, that those who were Lords of Council might hear any type of action but the others were confined to specifically Exchequer cases. There was, as we have seen, a division between those Auditors who sat in Council when their presence was not required in Exchequer and those who were continuously employed there and who received payment for the duties they performed, but the latter included Crawfurd, the justice-clerk, a regular attender in the Council at other times.[22] Certainly Kincragy and Dingwall do not appear in the sederunts of the Council for 1524 and 1525, but against this may be set other references implying that Auditors of accounts were drawn exclusively from the Lords of Council. In 1541 the records refer to " ane part of the lordis of counsale, auditouris of our soverane lordis last chekker," [23] which may be compared with the description of the Auditors of the Treasurer's account in 1474 as " richt reuerendis, mychti and noble lordis of oure sade Souerane Lordis counsale, be his hienes specialie deput and ordanit thairto, for the hering and resaving of the saide compt in his name." [24]

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[19] *ADC*, iii. 146, 243.

[20] ADC & S., 16. *f.* 96.

[21] *Acts of the Lords of Council in Civil Causes* (hereafter cited as *ADC*, ii) 79.

[22] Crawfurd attended every sitting of the Council between June 12 and 30, 1525.

It seems, therefore, that " Lords of Council " and " Auditors of Exchequer " could be used as alternative descriptions of those named in the Exchequer commission. Like those named " of the Session " or " of the Secret Council " they were given special powers and responsibilities without prejudice to those already incumbent on them as Lords of Council. Because of their special commission they were described, though not invariably, as " *Domini Auditores Scaccarii* " in their sederunts but in most of their decrees the decerniture described them as " Lords of Council " in reference to the capacity in which they gave judgment. Thus there was no real incongruity in the record when the continuation of a case by the " Lords of Council " was followed by a protest by the King's advocate, " albeit the Lordis Auditouris of the Chakker had for certane considerationis moving thaim continewit the said summondis to ane certane day." [25] It is possible, however, to separate the judicial business dealt with in Exchequer into the cases in which it merely served as a vacation court, and those which related to the revenue or the Exchequer accounts, and such a distinction may have been in the clerk's mind when he introduced the words " Auditors of Exchequer " into the decerniture of their decrees. In an early example, 1493, certain inhabitants of Pittenweem were summoned " to answer to our lord the King upon the unjust taking away of certain keling, herring, woollen cloth, skins and other customable goods outwith the bounds of the said town, uncustomed, not seen by the custumars, and without cocket. . . . The said Lords Auditors ripely advised, having received probations thereupon, have decreed and delivered, that the said persons shall pay to our lord the King £107 5s. 7d.," a penalty which seems to be at the same rate of one pound for each penny of unpaid custom as is found in a similar case involving Haddington two years later.[26] Decrees of the Auditors against the custumars and bailies of Haddington in 1518 and the provost, bailies, council and community of Dundee in 1541 were concerned with the liability of inhabitants of those burghs to pay customs on certain types of skins, from which Perth and Montrose also claimed exemption.[27] In 1518 the Auditors decerned that Nairn and Kintore had " tynt thar privelege and fredome of burgh " by failing to pay their burgh maills.[28]

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[23] *ADC*, iii. 510.

[24] *Accounts of Lord High Treasurer*, i. 1.

[25] ADC, 31. *f*. 168.

Even if the ambiguous term " the Lords " is taken into account, very few decrees by the Auditors are recorded. Any distinction, therefore, was but imperfectly made, and decrees of the Lords of Council are to be found in plenty in revenue cases. If we refer again to the proceedings of July 1525, we find decree given by the " Lords of Council " against the burgh of Cupar and by the " Lords of Council and Auditors of Exchequer " against Drummond and Murray, in both cases for arrears of rent due to the King. In 1529 the Auditors observed that " the custumaris bukis and the clerk of the coquet bukis of Perth aggreis nocht " and the following year the custumar was summoned to answer at the instance of the King and the Comptroller for omission of £23 2s. 1d. from his last account " as is clerelie understand to the Lordis Auditouris of the Chakker and verefeit to thame be the coquete bukis and uther wais." But although the matter was heard in Exchequer, the case was continued by the " Lords of Council " to August 31, 1529, at which time the clerks of cocket were to compear to " gif thair aitht apoun the buke of custume presentit be thaim before the Lordis Auditouris of the Chakker." [29] Similarly in 1540 the " Lords of Council " decerned Lord Drummond, stewart of Strathearn, to make compt and reckoning of all duties and casualties since his entry and to pay them to the Treasurer " now in this present chekker " [30] and in 1541, the " Lords of Council " continued a summons at the instance of the King and the magistrates of Wigtown against Thomas Kennedy and William Nesbit " to here and se thame be decernit be decrete of the Lordis Auditouris of the Chekker " to deliver certain salt or its price to the pursuers as escheat for unauthorised trading within the freedom of the burgh.[31]

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[26] *ER*, x. 381–382, 536–537. It will be observed that both these cases are recorded in the Exchequer Rolls.

[27] ADC, 31. *f.* 122; *ADC*, iii. 507; *ER*, xiv. 608–609, xv. 651–653, 681–682, xvi. 526, xviii. 769.

[28] *ADC*, iii. 126.

Having ascertained that the cases heard in Exchequer were decided by the Lords Auditors by virtue of their judicial powers as Lords of Council, and that there is very little distinction to be made between cases involving the revenue and other actions, we may now state an obvious corollary. If the Auditors acted judicially as Lords of Council, then it is self-evident, although there is ample confirmation in the records, that the Lords of Council might deal with revenue cases during the ten or eleven months of each year when the Exchequer was not in session. Returning then to the cases cited by Balfour, it is apparent that they are concerned with the conflict of jurisdictions between the royal and ecclesiastical courts and nothing further. In *The poor tenants of Uchtermukty* v. *Official Principal of St. Andrews* [32] the Lords of Council found that the official could not " curse " the tenants at the instance of Sir Laurence Alexandersoun for payment out of the rents of Crown lands, " becaus thai understand that the said mater concernis the kingis propertie and suld be discussit befor the Auditouris of Chekkir and na uther wais ; and gif the said schir Laurence has ony actioun aganis the said pure tennentis for thair fermis or dewiteis ordanis him to call thame before the Lordis Auditouris of Chekkir for the samin and he sall haf justice ministerit to him with expeditioune." Similarly in *Bertoun* v. *Thomsoun*, an action by an executor, a chaplain, against the Comptroller for payment of sums contained in extracts of the Household Books had been heard by the commissaries of the official of St. Andrews "quhilk wes nevir hard of befor that thai suld be jugeis to the Kingis comptis." The Lords of Council prohibited any further procedure because "the samyn is ane chekker mater concerning the Kingis bukis of houshald and suld be decidit befor the Auditouris of the Chekker." [33] A very similar case was decided by the Lords of Council.[34] One may also notice a later ruling that a case concerning the customs could not be heard before the Admiral "becaus it wes na seyfair mater." [35]

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[29] *ER*, xv. 666; ADC, 41. *f.* 104.

[30] ADC & S. 13 *f.* 188.

[31] ADC & S, 16. *f.* 136.

[32] March 7, 1529–30; *ADC*, 41. *f.* 3.

In summing up the evidence, it may be asserted that Balfour's cases prove no more than that the King's courts claimed an exclusive jurisdiction in cases affecting the Crown revenues. To this may be added the clear fact that only persons specially commissioned by the King could audit his accounts, and the Exchequer commission [36] gives the auditors power to allow, and presumably to disallow, payments, which in its turn implies the ability to pronounce on their validity and to decide between competing claims. This last point should be stated with caution, for even under James III it was customary to refer difficult questions to the King, shown by the frequent appearance in the accounts of the phrase *consulendus est rex*, which disappears in James IV's reign. Hence, although the Auditors certainly had power to amerce absent accountants from early times, other judicial functions appear to have been a later development. It is, of course, as difficult in some cases to distinguish between administrative and judicial acts, as it is to decide whether a petitioner is seeking an administrative or a judicial remedy, but it is clear that the so-called Exchequer decrees of 1387 and 1449 need only be regarded as declarations concerning payments to be allowed in the accounts.[37] But the comparatively late development of judicial proceedings in the Exchequer itself should not obscure the absence of any clear demarcation between the work of the Council and that of the Exchequer. The King's Council's original province was the general administration of the realm and there was at first no real differentiation between its sittings for justice, for finance or for state affairs, except that, as already observed, a special commission was necessary for those auditing accounts in Exchequer. Thus, although those commissioned united in their persons the dual functions of Lords of Council and Auditors of Exchequer, they did not keep those functions separate, as the offices of judges of the Court of Session and Lords of Justiciary at the present day are wholly distinct, albeit united in the same persons. Because no concept of clear-cut separation of powers had emerged, the Council could deal with administrative and judicial business affecting the revenue and equally the smaller Council-in-Exchequer could do the work of the whole Council if necessary. The continuation of cases to the Exchequer was partly a matter of administrative convenience for dealing with points which involved consultation of the Exchequer Rolls or which could best be decided in reference to the accounts which were being audited. In 1498 an action by Sir John Wemys was referred to the Auditors " because it concernis the compt of his unlawis and rollis of the Chekker." [38] Again, a hearing in Exchequer might be more convenient for litigants who would have to be there in any case to present their accounts.[39] Nevertheless the Auditors remained under the control and direction of the Council, for in 1498 " The Lordis consalis the Lordis of Chekkir til remit thir religious men this unlaw that thai fell in.''[40] The control was similar to that exercised over the admiral on occasion when the Council claimed the right to sit with the admiral as assessors or to hear admiralty actions themselves.[41] Furthermore, the apparent confusion of the records of " Council," " Secret Council," " Session " and " Exchequer " in James V's reign shows their administrative unity and the existence of an undifferentiated body of Lords of Council, some of whom received special commissions for certain judicial or administrative purposes. It may be observed that no alteration in this state of affairs resulted from the establishment of the College of Justice in 1532, which had no effect on the form or language of the records. It is quite fallacious to state that " from its foundation the Session exercised wide legislative powers through its Acts of Sederunt."[42]

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[33] May 23, 1533; ADC & S, 2. *f.* 168 (Stair Society, p. 5).
[34] *Ibid.* p. 3.
[35] *ADC*, iii. 637.
[36] *Cf.* Reg.Ho.Ch. 1319.

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[37] *Charters of Friars Preachers of Ayr*, 20; *Reg. de Dumferline*, 425; *Introduction to Scottish Legal History*, 339; a similar declaration is endorsed on a Perth burgh charter of April 10, 1394.

[38] *ADC*, ii. 251.

[39] *Wigtownshire Charters* (Scottish History Society) No. 109.

By 1541, however, it is possible to discern the beginning of a separation of functions between the Session and the Exchequer. Thomas Weir of Blakwod summoned Archibald Blair and others to compear before the Lords of Council " in the chekker " for suspension of letters proceeding upon " cursing " by the commissary of Douglas, " and at the calling thairof the saidis [Lordis] in the chakker allegeit thai mycht nocht proceid thairintill becaus thai wer nocht ane noumer and the mater wes ane sessioun mater and that thai wald nocht proceid thairintill quhill the nixt sessioun."[43] It may be presumed that the same Lords of Council sat both in Exchequer and in Session but some differentiation existed in the business they transacted.

It is impossible to give more than a brief summary of the development of the Exchequer after James V's death. The divergence of the work of the Council and the Court of

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[40] *ADC*, ii. 268.

[41] *ADC*, iii. lxiv, 76; *APS*, ii. 449–450.

[42] Compare the examples given in *Introduction to Scottish Legal History*, 27–28, with the relevant entries in *Acts of the Lords of Council in Public Affairs*; one should also note that the modern title of the MS. record of the Council from 1532, " Acta Dominorum Concilii et Sessionis," is unwarranted.

[43] ADC & S, 17. *f*. 84.

Session proceeded rapidly and it is clear from the terms used by Balfour that he conceived the Exchequer to be separate from both. It still had a limited session and no permanent officials, for in 1567 it was ordered " to be kepit in the aunceant and accustomat tyme of yeir, *viz.*, in the vaccance utherwyis provide utheris auditouris and clerkis nor the lordis and clerkis of sessioun."[44] Thus it was to some extent dependent upon the Court of Session, which remained the appropriate forum for cases involving the revenue when the Exchequer was not sitting. At the same time the Privy Council maintained its control over all aspects of administration, including finance. The emergence of the Exchequer as a permanent court dates from 1584, its earliest register beginning in February 1583–84. In that month the King and Council made provision for the Exchequer to deal with problems affecting the revenue and in May 1584 an Act of Parliament laid down that suspensions and letters conform in matters concerning the revenue might be granted only " be sic off the numer of our College of Justice as ar constitute auditouris of our chekker " and that such matters " salbe discussit befoir our chekker in our chekker hous." The Auditors were to sit on Tuesdays and Thursdays in time of session and when they pleased in vacation and their " decisionis and decrettis " were to be " als vailable and effectuall in all respectis as gif the samyn wer gevin and pronunceit to be a full and haill numer of the saidis Lordis of Counsell sittand in the tolbuith of Edinburgh." Although this Act was ratified in 1593, five years later it was provided that there should be no more permanent commissions of Exchequer.[45] Even for administrative purposes the Exchequer remained under the control of the Privy Council, acting in the latter part of James VI's reign through a smaller body called the Commissioners of Rents. In 1633, the legislation of 1584 was re-enacted,[46] but the development of the Exchequer was retarded by the financial and administrative confusion of the civil war. After the Restoration the Exchequer at last emerged as a court with an entirely distinct jurisdiction. In 1665 it was necessary for the Solicitor-General to be authorised by the King to prosecute for casualties before the Court of Session and the royal letter to the Lords of Session explains that " though wee have just ground to thinke these particulars which so nearly concernes our revenue and casualties ought and should bee prosecute before our Commissioners of Exchequer, yet at present . . . we have thought fitt to command him . . . to prosecute the same before yow." [47] But the Commissioners of Exchequer were still drawn partly from the Privy Council and partly from the Court of Session and not until a remodelled Court of Exchequer on the English pattern was established in 1708, were the judges of the two courts wholly distinct.[48]

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[44] *APS*, iii. 43.

[45] *APS*, iii. 309, iv. 27, 165.

[46] *APS*, v. 35.

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[47] Books of Sederunt, vi. 170–171.

[48] The writer is greatly indebted to Professor W. Croft Dickinson for reading the draft of this article and for his comments and suggestions on it.

LIABILITY ARISING FROM UNJUSTIFIED ENRICHMENT IN THE LAW OF THE UNION OF SOUTH AFRICA

(continued from p. 142)

Modern South African Law

(a) *The old actions*

The *condictiones sine causa* are found in modern South African law in substantially the form in which they existed in the classical Roman-Dutch law.[72]

In connection with the *condictio ob turpem vel iniustam causam* it must be pointed out that the *par delictum* rule is not absolutely applied, as it apparently was in Holland. It has been authoritatively laid down by the Appeal Court that a person can condict even where it was *turpis* for him to have performed, provided that " simple justice between man and man " or " public policy " demands this,[73] and this new rule has since been followed.

It has consistently been held that there can in general be no *condictio indebiti* where the plaintiff had paid the *indebitum* as a result of an error of law.[74] This rule is, however, subject to the exception that, if the payer had paid in pursuance of an agreement which he thought was a valid contract but which was void on account of some formal defect, he can reclaim, unless the receiver had already made full performance of what he had undertaken to perform, or was willing and able to make such performance.[75]

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[72] " Our law relating to condiction . . . is essentially Roman." *Per* Van den Heever J. in *Pucjlowski* v. *Johnston's Executor*, 1946 W.L.D. on p. 3. See for instance Wessels: *The Law of Contract in South Africa* (2nd ed.), §§ 661–691; 3635–3770; Maasdorp: *Institutes of South African Law*, Vol. 3 (6th ed.), pp. 349–356; Lee and Honoré: *The South African Law of Obligations*, §§ 684–695, and the cases cited by them.

[73] See *Jajbhay* v. *Cassim*, 1939 A.D. 537.

[74] See *Delponte's Estate* v. *Barnes*, 1910 C.P.D. 118; *Benning* v. *Union Government*, 1914 A.D. 420; *Heydenrych* v. *Standard Bank*, 1924 C.P.D. 335. It is generally held that this deviation from the Roman-Dutch law was introduced by *Rooth* v. *The State* (1888) 2 S.A.R. 259, but in fact the judgment in this case does not support such a conclusion.

It has been accepted that the " doctrine of conversion " does not apply where the *bona fide* intermediary through whose hands property had passed *sine causa* had given value for it; *i.e.*, in such cases he incurred no obligation towards the owner.[76] Whether the intermediary who had obtained possession of the property *ex causa lucrativa*, is liable, must still be considered an open question.

An important new principle has been established, that where the person who condicts had himself received something from the defendant, he must offer to restore what he had received or, where that is not possible, pay its value.[77] Harmful events coincident with the enrichment which consist of counter-performance are thus taken into account, but not other harmful collateral events. Thus, if the possession of land has been handed over in terms of an invalid contract and money has been paid by the receiver, the receiver cannot demand his money back unless he offers to evacuate the land; but he need not offer to pay for the rental value of the property which was lost by the defendant to be able to condict. This is also a harmful collateral event, but it is not held to be counter-performance.[78]

A thesis for the LL.D. degree dealing with *negotiorum gestio* has recently been published [79] and the author of that work shows that our modern law on this topic is substantially Roman-Dutch law.

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[75] See *Carlis* v. *McCusker*, 1904 T.S. 917; *Wilken* v. *Kohler*, 1913 A.D. 135; *Kennedy and Kennedy* v. *Lanyon*, 1923 T.P.D. 284 (in this case the court mentions the *condictio causa data causa non secuta* but, in view of the fact that it does not appear that the parties knew that the agreement was invalid so that they must be held to have performed *causa solvendi* and not *causa acquirendi*, this is a wrong classification); *Van der Berg* v. *Shaw*, 1933 T.P.D. 242; *Mattheus* v. *Stratford*, 1946 T.P.D. 498. In the case of invalid hire-purchase contracts, these rules have been somewhat modified. See *Denton* v. *Haldon's Furnishers (Pty.) Ltd.* 1951(1) S.A. 720(T.) and *M.C.C. Bazaar* v. *Harris and Jones (Pty.) Ltd.* 1954(3) S.A. 158(T.).

[76] See *Leal & Co.* v. *Williams*, 1906 T.S. 554; *Van der Westhuizen* v. *MacDonald and Mundel*, 1907 T.S. 933; *Morobane* v. *Bateman*, 1918 A.D. 460; *John Bell & Co., Ltd.* v. *Esselen*, 1954(1) S.A. 147(A.).

[77] See *Albertyn* v. *Kumalo*, 1946 W.L.D. 529; *Bushney* v. *Joliffe*, 1953(4) S.A. 273(W.); *M.C.C. Bazaar* v. *Harris and Jones (Pty.) Ltd.* 1954(3) S.A. 158(T.) and *Wilson* v. *Smith*, 1956(1) S.A. 393(W.).

[78] See *Pucjlowski* v. *Johnston's Executor*, 1946 W.L.D. 1.

[79] *The South African Law of Unauthorised Administration* (*Negotiorum Gestio*) by L. Rubin.

The correct principles governing the liability of a person of imperfect contractual capacity, towards whom performance had been made in pursuance of a contract into which he had entered without his guardian's assistance or consent, were deviated from in a long line of decisions following the judgment in *Nel* v. *Divine, Hall & Co.*[80] In this case it was decided that a minor was bound to the terms of the contract, that he had to make the counter-performance agreed upon if the contract as a whole enured to his benefit, *i.e.*, if he had " made a bargain." This " benefit theory " was subjected to severe attack and has now been decisively rejected by the Appeal Court, which held that the minor is bound merely to return what he had received or, where that is not possible, the value of what he had received to the extent that he was enriched by it.[81]

For the purpose of this article it is not necessary to deal with the enrichment actions of the *bona fide* possessor, the *mala fide* possessor, the lessee, the fiduciary and the usufructuary. Suffice it to say that the modern law is founded firmly on the interpretation given by the courts to the classical Roman-Dutch law.[82]

(b) *The recognition of a general enrichment liability by the courts*

We have now seen that in Roman law there were a number of enrichment actions which could be used under specific circumstances but that there were gaps between these actions; and that, if a person at whose expense another had been enriched could not fit the facts of his case into one of the recognised categories, he was without a remedy. We then saw that the position in Roman-Dutch law was substantially the same, although the scope of the remedies had been enlarged to some extent. In the immediately preceding section we dealt with modern South African law and saw that the Roman-Dutch actions, with some changes, are in force to this day. There is, however, a very important difference between modern South African law and the classical Roman-Dutch law in respect of enrichment liability, namely that modern South African law *recognises a general enrichment liability which covers the residual cases not covered by the old actions.*

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[80] (1890) 8 S.C. 16.

[81] See *Edelstein* v. *Edelstein, N.O.*, 1952(3) S.A. 1 (A.).

[82] See on the *bona fide* possessor, *Bellingham* v. *Bloometje*, 1874 Buch. 36; *Barnard* v. *Colonial Government* (1887) 5 S.C. 122; *De Beers Consolidated Mines* v. *London and S.A. Exploration Co., Ltd.* (1893) 10 S.C. 359; *Meyer's Trustee* v. *Malan*, 1911 T.P.D. 559; *Lechoana* v. *Cloete*, 1925 A.D. 536; *Wipplinger* v. *Wax*, 1933 E.D.L. 60. Some cases place the *mala fide* possessor on the same footing as the *bona fide* possessor as regards compensation (see *Bellingham's* case and *Campbell* v. *The Golden Crescent Gold Mining Co.* (1890) 3 S.A.R. 248), while in other cases he is limited to a claim for necessary expenses (see the *De Beers* case and *Currey, N.O.* v. *Stevens* (1903) 9 H.C.G. 298). See on the fiduciary, *ex p. Van Zyl*, 1948(2) S.A. 210(C.), and on the usufructuary, *Brunsdon's Estate* v. *Brunsdon*, 1920 C.P.D. 159.

The general enrichment liability was first recognised in connection with *bona fide* occupiers. It has been pointed out above that *bona fide* possessors and *mala fide* possessors, *i.e.*, people who held another's property *animo domini*, were entitled to compensation for improvements. Certain *rightful* occupiers, like lessees, were also entitled to compensation; but there is no authority in the common law for stating that *bona fide* occupiers, *i.e.*, people in possession of another's property who admit the owner's title but believe that they themselves have a legal right to occupy the property, while they have not, are also entitled to compensation.

The first case dealing with this topic to come before our courts was that of *Bellingham* v. *Bloometje.*[83] In this case a person hired a farm and made certain improvements on what he thought was the hired land. In fact he had made an error regarding the boundaries, and the improvements were made on the adjoining farm. It is clear that he was a *bona fide* occupier. He claimed compensation and succeeded.

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[83] 1874 Buch. 36.

The Chief Justice, Sir Henry de Villiers, who delivered the judgment, did not, however, realise that the title of the plaintiff was of importance. He used the terms " *bona fide* possessor " and " *bona fide* occupier " interchangeably and was clearly of the opinion that the old common law would cover the case.

In 1911, however, in the case of *Rubin* v. *Botha*[84] a clearer insight was shown into the matter. The parties entered into a lease of a farm for ten years according to which the lessee would not pay rent but would erect certain specified buildings on the land. After the lessee had been in occupation for three years and had erected the buildings, the owner discovered that the " lease " was invalid because certain formalities required for leases of land had not been complied with. He now ejected the tenant, who claimed compensation for the improvements.

At first sight it might be thought that the indicated action would be the *condictio indebiti* because performance had been made in pursuance of what the plaintiff thought was a valid contract but which was not, *i.e.*, the plaintiff erroneously thought he was paying a legally enforceable debt. As has already been stressed, however, the *condictio indebiti* did not lie (and still does not lie) for the value of a *factum.* The case had thus to be decided on the basis that the plaintiff was a *bona fide* occupier, and it was so decided.

The Chief Justice merely invoked his judgment of thirty-seven years before in *Bellingham's* case. Sir James Rose-Innes, however, went more fully into the matter. He pointed out that the common law did not cover such cases and that the judgment in *Bellingham's* case was wrong in so far as it was there assumed that the common law did cover such cases. He felt, however, that, as the owner of the land had clearly been enriched *sine causa* at the expense of the plaintiff, he should be liable.

There was a difference of opinion between the judges as to how the compensation was to be awarded. The view of

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[84] 1911 A.D. 568.

Sir James Rose-Innes on this aspect of the case need not concern us here. Lord De Villiers decided, and Appeal Justice Maasdorp concurred with him, that the measure of compensation was either the amount expended by the plaintiff, or the actual increase in the value of the land, minus a reasonable sum representing the rental value of the land for three years which the owner had lost, whichever was the lesser. There can be little doubt that this is the correct standard to apply.

It is of importance to note that we have here completely developed enrichment action. A harmful event coincident with the enrichment is taken into account, although it was not counter-performance.[85] Where a *bona fide* possessor claims compensation, the value of fruits he has enjoyed is subtracted from his expenditure because it is a *lucrum cum damno*, but harmful collateral events are not taken into account when calculating the enrichment, *e.g.*, that the possessor has also harmed the land or buildings. In the instant case the subtraction is made from the enrichment, irrespective of the fact that the tenant might not himself have been enriched to the same extent.

If we are to take in chronological sequence those cases in which the South African courts recognised a general enrichment action under circumstances not covered by the old common law, the next group of cases will take us away from occupiers; but for the sake of continuity, we shall deal first with later cases also involving occupiers.

In 1915 the Appeal Court heard the case of *Fletcher and Fletcher* v. *Bulawayo Waterworks Co., Ltd.*[86] The company had obtained the right to sink wells on hired land so as to provide Bulawayo with water. They made a mistake regarding the boundary of the leased land, sank wells on the adjoining land and found water, thereby considerably increasing the value of the land. Chiefly on the authority of *Rubin's* case, an enrichment claim was allowed.

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[85] It has been pointed out above (p. 227) that where the possession of an article is handed over, the performance is merely the handing over of the possession and not the value of the use or the rental value. This is certainly a harmful event collateral to or coincident with the enrichment, but not a harmful collateral event consisting of performance or counter-performance.

[86] 1915 A.D. 636.

Since these two cases were decided there have been many cases in which occupiers were allowed to succeed on enrichment claims. It is unnecessary to detail them here.

We next turn our attention to a series of cases where work was done in terms of a contract but where, because the work was badly done, it was held that the person who had done the work could not institute an action based on the contract. He was, however, allowed to sue on the basis of enrichment.

In the case of *Hauman* v. *Nortje*[87] there was a contract for an addition to be made to a house and the contract price was £60. The work was badly done but the owner of the house made use of the addition and paid part of the contract price. The builder sued him for the balance and he refused to pay. The court held that in such a case the builder had no right to sue *ex contractu*, because his right to claim the sum agreed upon became enforceable only when he had made full performance. As, however, the owner had not rejected the benefit and as he was clearly enriched at the expense of the builder, he was held bound to pay on the basis of enrichment. It was held that he had to pay the contract price less the amount which it would cost to have the defects rectified.

This case has been subjected to severe criticism.[88] It has been pointed out that, as long as the owner had not cancelled the contract, he was bound to it and had to pay the contract price less the amount necessary to cure the defects, unless he rejected the improper performance without cancellation and insisted on proper performance, in which case he would have to pay the full price against proper performance. It is not in every case of breach of contract that the innocent party would be allowed to cancel the contract or to reject the imperfect performance. If the defect were not substantial, he would not be allowed to cancel or reject and would be compelled to pay the contract price, suitably reduced. In this case the owner, assuming that the defect was sufficiently serious to justify the more drastic remedies, had in fact neither purported to cancel the contract nor to reject the performance and to insist on proper performance. He had accepted the work while pointing out that it was defective and had paid the contract price subject to what he considered a fair reduction. On the view of the law here propounded he *had* thus in fact been held liable to pay the correct amount. But the court had held that the basis of his liability was *enrichment*, and not contract, which was wrong. On the other hand, if we do hold that his liability arose from enrichment, the calculation was wrong because in calculating the enrichment the contract price cannot be looked at. This probably contains a sum as profit for the builder and has no necessary relation to the enrichment at all. The correct basis of calculation would have been to calculate the amount by which the property had been enhanced in value as a result of the building, in the same way as enrichment is calculated in the case of *bona fide possessio* or *occupatio*. This case has, however, been followed in a long line of decisions,[89] and the *obiter dictum* that a contractor who willingly and knowingly departs from the terms of his contract can claim no compensation whatsoever, not even on the basis of enrichment, has also been followed.[90]

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[87] 1914 A.D. 293.

[88] See for instance De Wet and Yeats: *Die Suid-Afrikaanse Kontraktereg en Handelsreg* (2nd ed.), pp. 135–138.

In spite of the criticisms levelled at this case, which the author feels to be justified, it is a very important judgment as far as enrichment liability is concerned. It does decide that, where a contracting party is debarred from instituting a contractual action, he may institute an action based on unjustified enrichment; and if the requirement is made that he can only sue thus when the contract has been cancelled, the principle is entirely acceptable. The person enriched may of course under suitable circumstances reject his enrichment.

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[89] See for instance, *Breslin* v. *Hitchins*, 1914 A.D. 312; *Van Rensburg* v. *Straughan*, 1914 A.D. 317; *Viljoen* v. *Visser*, 1929 C.P.D. 473; *Lievaart* v. *Strijdom*, 1938 T.P.D. 586; *Kam, N.O.* v. *Udwin*, 1939 W.L.D. 339; *Miller* v. *Larter*, 1941 E.D.L. 98; *Wegerle* v. *Pretoria Machinery Sales*, 1946 T.P.D. 319; *B. and P. Foundry Engineers* v. *Cilliers*, 1950(1) S.A. 257(O.).

[90] See *Kam, N.O.* v. *Udwin*, 1940 W.L.D. 137; *Muller* v. *Grobbelaar*, 1946 O.P.D. 272; *Jansen* v. *Rosenbaum*, 1948(1) S.A. 578(T.).

It must be stressed that under the common law there could not have been an enrichment action under these circumstances. It is not possible to fit this type of case into any of the accepted categories. It is true that the court invoked Voet, 19.2.40, as justifying the granting of this action. De Wet and Yeats, however, read this passage of Voet as dealing with contractual liability,[91] and the author is in agreement with them. It is clear, however, that Lord De Villiers and Sir James Rose-Innes would have granted the action even without the Voet passage. They both first deal with enrichment liability in general and with the extension of the doctrine in *Rubin's* case. Voet is then invoked to lend support to their conclusions.[92]

The cases just dealt with were cases of *locatio conductio operis*. The principles laid down in regard to such contracts are applied also to *locatio conductio operarum*.[93] A servant who is justifiably dismissed during a current term of service cannot claim remuneration *ex contractu* for the time he has worked, because the contract has been cancelled; but he is entitled to sue his former employer on the basis of enrichment. In these cases the only possible basis of calculation would appear to be to take a *pro rata* portion of the contractual remuneration according to the portion of the term during which the servant worked. Here the employer is enriched in consequence of not having had to pay for the work, which work does not necessarily increase his patrimony. A servant might polish the floors of a house and dust it but after a few days there might be no signs left of his labour. This is thus enrichment in consequence of non-expenditure rather than of increased *activa*, as in the case of *locatio conductio operis*.

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[91] De Wet and Yeats, *op. cit.*, pp. 134–135.

[92] See especially pp. 301–310 of the judgment.

[93] See *Spencer* v. *Gostelow*, 1920 A.D. 617.

In *Spencer's* case which we have just considered, the judgment in the court *a quo*, which was upheld on appeal, was delivered by Sir John Wessels. He stated amongst other things: "That this rule (that no one ought to be enriched at the expense of another) is of universal application, has often been decided by in our courts, and reiterated by the Court of Appeal in *Nortje* v. *Hauman*." [94]

It must be noted that a *deserting* servant is not entitled to compensation under any head.[95]

In addition to the cases which have thus far been dealt with and which can be classified into the groups of *occupatio* cases, cases of *locatio conductio operis* and cases of *locatio conductio operarum*, there are a number of miscellaneous cases which must be briefly noted.

In *Pretorius* v. *Van Zijl*[96] the custody of an orphan girl, who had some money of her own, was given by her *de facto* guardian to a foster-parent on the understanding that the child would not be removed from his custody. After he had cared for her for some years, the legal guardian, who had meanwhile been appointed, did remove her. The foster-parent now instituted an enrichment action against the girl. The argument was that he had not been under a legal obligation to support her but that he had done so voluntarily on the understanding that she was to remain with him as his child. When this supposition was not realised, the entire basis of the support fell away and he therefore became entitled to reclaim. The person enriched was the girl, because the burden of her support would otherwise have fallen on her own estate and not on the estate of her guardian. The action was granted, and in the judgment, delivered by Judge-President De Villiers, there occurs a passage which merits quotation.

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[94] Reported on p. 619 of the Appellate Division report.

[95] See *Muller* v. *Grobbelaar*, 1946 O.P.D. 272.

[96] 1927 O.P.D. 226.

> "The doctrine against enrichment is well established. . . . The doctrine has been recognised by the Appellate Division in several cases, for instance, *Rubin* v. *Botha*, *Fletcher* v. *Bulawayo Waterworks Co., Ltd.*, and *Lechoana* v. *Cloete*. It is true that these three cases deal with the occupation of land, but the doctrine against enrichment is in them applied to circumstances where the law as to compensation for improvement to landed property does not apply; in other words, in circumstances which would equally well have warranted its application to any other cases of enrichment. On general reasoning too, it seems reasonable to suppose that the doctrine against enrichment, as it exists at all, must necessarily be of general application. I come to the conclusion that the doctrine against enrichment at the expense of another is of general application." [97]

In *Knoll* v. *S.A. Flooring Industries, Ltd.*,[98] comment was made on the judgment in the earlier case of *Williams' Estate* v. *Molenschoot and Schep (Pty.) Ltd.*,[99] in which a builder, who believed that he had entered into a contract with an authorised representative of the owner of certain buildings to effect repairs to them and who had effected the repairs, was allowed to sue the owner as *negotiorum gestor* when it appeared that the purported agent had no authority. In *Knoll's* case the learned judge, De Villiers J.,[1] said that to his mind it was not necessary to invoke the principles of *negotiorum gestio* in a case like that, because "the equitable doctrine of unjust enrichment is wide enough to cover the facts in *Williams'* case." [2] As was pointed out by John,[3] this is a dangerous line of reasoning, because the *gestor's* claim is not limited to the enrichment of the *dominus*. Nevertheless this is once again the recognition of unjustified enrichment as a general cause of action because, not only is no classical enrichment action mentioned, but it is clear that no such old action was applicable.

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[97] On p. 229 of the report.

[98] 1951(1) S.A. 404(T.).

[99] 1939 C.P.D. 360.

[1] The puzzled reader has by this time probably concluded that Lord De Villiers is immortal, or otherwise that the Bench is exclusively reserved for members of the De Villiers clan! Since Lord De Villiers (then Sir Henry) became Chief Justice of the Cape Colony in the '70s of the last century (he became the first Chief Justice of the Union and Lord De Villiers in 1910), not a decade has passed during which some member of this distinguished family has not sat on the Bench somewhere in the Union.

[2] On p. 408 of the report.

Finally reference must be made to *Kruger* v. *Navratil*[4] where the court quoted with approval from Wille's *Principles of South African Law* to the effect that " today the old classification has been discarded in our law and ' unjustified enrichment ' is recognised as a distinct source of obligations."[5] In so far as the impression is here created that the rules of the old remedies no longer apply, the statement goes too far. The old rules do in fact still apply as appears from the ensuing pages of Wille's book.

There remain for consideration a number of doubtful cases. In the first place we refer to the *precario habens*, the person who occupies the land of another by that other's leave and licence (" tot wederopseggens toe ") and without paying compensation. According to general principles it is clear that such a person who has made improvements to the property should have an enrichment claim against the landowner who has not rejected the enrichment. This matter has never been decided. In *Lechoana* v. *Cloete*,[6] where the court was faced with such a claim, the claim was rejected because the landowner had in fact offered some compensation and there was no evidence that his enrichment exceeded that amount. De Villiers J.A. does go so far as to say that " There is no objection in principle in applying the maxim against enrichment in the present case." Sir John Kotzé, who also sat, scrupulously avoided making any *obiter dicta* as to the rights of precarists.

It has been pointed out above that in *Rubin's* case account was taken of the value of the use or the rental value of the property which had been lost by the owner of the land when he was sued by the occupier who had improved the land. This loss was deducted from the increase in the value of the land.[7] There have been cases where the occupier who was placed in occupation in pursuance of an invalid agreement of sale did not improve the property and where he did not institute an action, but where the owner of the article (usually land) in his turn instituted an action alleging unjustified enrichment at his expense and claiming compensation. In the Union the courts have been unwilling to grant this action and for very unconvincing reasons,[8] but in a recent case decided by the High Court of Southern Rhodesia the validity of such a claim was recognised.[9]

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[3] See John, *op. cit.*, p. 136.

[4] 1952(4) S.A. 405(S.W.A.).

[5] The quotation occurs on p. 408 of the report and is from p. 455 of Wille's 3rd ed., wrongly cited as p. 435 (p. 473 of the latest edition).

[6] 1925 A.D. 536.

As it is hoped this survey has shown, modern South African law has kept in step with other Romanistic legal systems and has taken the important step of recognising a general enrichment liability. It must be stressed that, although most of the cases which have been discussed can be classified into groups, the development must not be interpreted as being similar to that which occurred when, for instance, the *bona fide* possessor received an action in addition to his *ius retentionis*. The courts have not merely added a few more classes of cases in which the person impoverished would have a claim—they have in truth decided that, in *all* cases where there has been unjustified enrichment of one person at the expense of another, and where the case does not fall into one of the old categories, there shall be a liability except where public policy militates against this.[10] That this is the interpretation given by the courts themselves is made clear by the quotations from *Spencer* v. *Gostelow* (on p. 235 above) and *Pretorius* v. *Van Zijl* (on p. 236 above).

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[7] See pp. 230–231 above.

[8] The leading case in this regard is that of *Pucjlowski* v. *Johnston's Executor*, 1946 W.L.D. 1; in a confused and confusing judgment it is first denied that modern South African law recognises a general enrichment action. The present writer does not think that this conclusion can be seriously defended. The judge finds an additional reason for refusing the action in the fact that the landowner himself had placed the occupier in occupation. The answer to this is surely that the landowner placed the occupier in occupation under a supposition common to the parties which turned out to be false, namely that the agreement of sale was a valid contract. The doctrine of the supposition (Afrikaans "veronderstelling," German "Voraussetzung"—see Windscheid, *op. cit.*, § 423) is part of our law, and where such a supposition proves to be wrong, enrichment which took place by virtue of an act which had this supposition as its juristic *causa* becomes unjustified enrichment and must lead to a *condictio causa data causa non secuta* (where property was delivered and the supposition related to a future event), or a *condictio sine causa stricto sensu* (where property was delivered and the supposition referred to a present state of affairs or a past event), or to the general action where the enrichment did not take place as a result of the delivery into ownership of property. This case was followed by *Wilson* v. *Smith*, 1956(1) S.A. 395(W.) and *Le Roux* v. *Van Biljon*, 1956(2) S.A. 17(T.).

[9] *Lodge* v. *Modern Motors, Ltd.*, 1957(4) S.A. 103(S.R.). Roman-Dutch law is the common law of Southern Rhodesia, but not of the other territories comprising the Central African Federation.

This development, as has been shown, is due to our courts. Might it not perhaps be said that in this matter the courts have exceeded the true limits of their power and have usurped legislative functions? In considering this aspect of the matter it must be kept in mind that the South African legal system is not a static system, tied to an immutable code or a sacrosanct common law. It is a dynamic system of law and it is the proper function of the courts to adapt the law to changing ideas and needs, at the same time ensuring that such adaptation is in harmony with the nature and spirit of the legal system. In this context the words of Lord De Villiers in *Henderson* v. *Hanekom* are appropriate: "However anxious the Court may be to maintain the Roman-Dutch Law in all its integrity, there must in the ordinary course be a progressive development of the law, keeping pace with modern requirements."[11] Also appropriate are the words of Chief Justice Stratford:

> "Now the Roman-Dutch Law, which we must apply, is a living system, capable of growth and development to allow adaptation to the increasing complexities and activities of modern civilised life. The instruments of that development are our own Courts of Law. In saying that, of course, I do not mean that it is permissible for a Court of Law to alter the law; its function

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[10] See p. 252 below on the question of public policy and other factors excluding an action.

[11] (1903) 20 S.C. on p. 519.

> is to elucidate, expound, and apply the law. But it would be idle to deny that in the process of the exercise of those functions rules of law are slowly and beneficially evolved. That evolution, to be proper, must come from, and be in harmony with, sound first principles, which are binding upon us."[12]

It has been shown that there has been a tendency for centuries towards making the maxims in the *Corpus Iuris* aimed against unjustified enrichment progressively more effective by granting remedies over an ever-widening field. This enlargement of the remedy against unjustified enrichment which has taken place in South Africa is thus merely the logical advance along this ancient road.

In view of the above considerations the writer feels that the rôle played by the courts in bringing about this development, far from being open to criticism, is a laudable one.

What may well be said, however, is that the position which now obtains is not satisfactory and cannot be considered as the final stage of development. Our present enrichment liability is governed partly by the rules of past ages and partly by the new general action which, as has been pointed out, is a more developed enrichment action than the old actions. There is an unnecessary multiplicity of rules and "actions," and every case on this topic demands a careful, casuistic classification before we can say what the exact content of the liability is.

The solution is obvious—the old actions must disappear and the scope of the general action must be widened to include the field now covered by them. Casuistry must go by the board, and a few broad principles must take their place to cover all possible cases. Lack of space prevents a discussion of the legal changes involved, for they are not inconsiderable. It has already been pointed out that this levelling process did take place in Germany and Switzerland even before the Codes were promulgated.[13]

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[12] In *Jajbhay* v. *Cassim*, 1939 A.D. on p. 542.

[13] See pp. 128 and 129 above.

Dr. John feels that the future development of this part of our law might well be left to the courts.[14] The writer doubts whether this would be possible. While the extension of the doctrine can be considered to have been within the permissible scope of the courts' powers, the sweeping away of the old remedies would be too drastic a process for the courts to undertake. Perhaps the fatal objection to such a course is the Prescription Act, according to which some enrichment actions become prescribed after three years, while others become prescribed after thirty years.[15] It will be readily appreciated that this militates against the absorption by the general action of the various old actions and that it necessitates a classification of each individual case into its appropriate pigeon-hole. Unless this Act is changed, the present variegated pattern will remain with us. The solution favoured by the writer is legislation on the pattern of the German and Swiss Codes.

(c) *The requirements of the general enrichment liability in South African law*

We shall conclude this survey by a brief exposition of the rules governing the general enrichment liability. There are five requirements.

(1) The defendant must be enriched.

(2) The enrichment must be at the expense of the plaintiff.

(3) The enrichment must be unjustified (*sine causa*).

(4) The case must not fall under one of the classical enrichment actions.

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[14] The exact words of John in the unpaginated Introduction to his treatise are: "It must be left to the courts to forge the sword of enrichment liability by their future judgments, if this weapon should appear to be required." (Translation by the present writer.) It may be pointed out here that this treatise contains a remarkable contradiction of major importance. If the writer has read aright, there is on p. 137 the acceptance of the existence in our modern law of the general enrichment action, while on p. 141 its existence is denied!

[15] Act No. 18 of 1943, read together with *Vryburg School Board* v. *Cloete*, 1955(3) S.A. 355(A.). Some argument on the interpretation of the Act and the judgment is necessary to substantiate this conclusion, but lack of space prevents any elaboration on this point.

(5) There must be no rule of law which, in spite of the requirements (1)–(4) above being satisfied, prevents the person impoverished from recovering.

We deal with these requirements *seriatim*. In considering them, we shall be guided by the old actions and by modern Continental law, no less than by judgments dealing specifically with the general action.

(1) *The defendant must be enriched*

This requirement is obvious.[16] The enrichment may consist of an increase of the *activa* of his estate or a non-decrease of the *activa*, or of a decrease of the *passiva* or a non-increase of the *passiva*.[17]

The enrichment is calculated by comparing the actual level of the estate with the level it would have had if the enriching event had not taken place,[18] taking into account all juridically relevant factors. It follows that harmful events collateral to or coincident with the enrichment and other events affecting the enrichment, *e.g.*, destruction of the building erected by an occupier on another's land, must be taken into account in determining the liability.[19] It can therefore be seen that liability flowing from enrichment is of a fluctuating nature, that, in contradistinction to contractual liability, it has no *a priori* fixed content.[20] This variability is, however, limited to a greater or lesser extent under the following circumstances:

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[16] See *Fletcher and Fletcher* v. *Bulawayo Waterworks Co., Ltd.* 1915 A.D. on p. 649; *Ras* v. *Vermeulen*, 1927 O.P.D. on p. 11.

[17] See Windscheid, *op. cit.*, § 421; Von Mayr: *Bereicherungsanspruch*, pp. 110–192; Van der Leij, *op. cit.*, pp. 55–58; Enneccerus-Lehmann, *op. cit.*, pp. 848–850; Von Tuhr-Siegwart, *op. cit.*, pp. 400–403; Bregstein, *op. cit.*, pp. 198–213.

[18] In the case of *Krueger* v. *Navratil*, 1952(4) S.A. 405(S.W.A.) the court wrongly decided that the defendant's liability could be calculated on the basis of benefits he *could have* enjoyed, that it was not limited to benefits *actually enjoyed*. As was pointed out by Prof. Scholtens in his article in 1953 *S.A.L.J.* pp. 9 *et seq.*, the court mistranslated some of the authorities on which it relied and misconstrued others. That the principle is as stated in the text appears with abundant clarity from Grotius: *Inleiding*, 3.30.3; 3.30.19, and Van der Keessel's comments on that passage; *De Jure Belli ac Pacis*, 2.10.2.1; Voet, 13.1.5; and also follows from the nature of the action. It also applies in German and Swiss law. See Enneccerus-Lehmann, *op. cit.*, p. 881; Von Tuhr-Siegwart, *op. cit.*, p. 420.

[19] See Von Tuhr-Siegwart, *op. cit.*, pp. 420–426; Enneccerus-Lehmann, *op. cit.*, p. 883; Van der Leij, *op. cit.*, pp. 101–103; *Rubin* v. *Botha*, 1911 A.D. 568, and p. 231 above.

[20] There is considerable authority for holding that in Roman law a person enriched by a sum of money had to repay an equal amount whatever had happened to the

(i) When the person enriched discovers that he is enriched at the expense of another without legal cause. Under these circumstances the fact that his enrichment has diminished or disappeared entirely would liberate him, *pro tanto* or *in toto*, as the case might be, only if he could show that neither *dolus* nor *culpa* on his part had led to such diminution or disappearance.[21]

(ii) When the person enriched, although he does not *know* that he is unjustifiably enriched at the expense of another, had to keep that possibility in mind. The rules about fault set out above apply. This type of case would occur when enrichment had taken place under a supposition common to the parties, which the person enriched knew might not be realised, or might turn out to be false.[22] It would also apply where a demand for compensation is made on the person unjustifiably enriched by the person at whose expense he is enriched, and he, as a result of a justifiable error, believes that he is not liable. The defendant would not be in *mora* in such a case, because fault is an element of *mora*[23]; but he must keep in mind the possibility that he might in fact be liable, and he must not allow the enrichment to diminish in consequence of blameworthy conduct on his part.

(iii) When the person enriched falls into *mora*. *Mora* exists where a demand has been made and there is culpable delay in making performance. In such a case he would be freed from liability (wholly or in part as the case may be)

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money he had received, or to his estate in consequence of his having received the money, *e.g.*, that he had commenced squandering his money without having anything to show for it, which he would not have done had the enrichment not taken place. In modern law this variability does, however, exist even where the enrichment originally consisted of the receipt of a sum of money or where enrichment which came about in some other form is turned into money. See *King* v. *Cohen Benjamin & Co.*, 1953(4) S.A. 641(W.).

[21] See D.12.6.26.12; 12.6.65.8; Voet, 12.6.12; Windscheid, *op. cit.*, § 424.

[22] See D.24.1.37; 39.6.39; Windscheid, *op. cit.*, § 424.

[23] See Van Zijl Steyn: *Mora Debitoris volgens die Hedendaagse Romeins-Hollandse Reg*, pp. 43–45.

only if he could show that, even had he made performance in proper time, the event which had diminished or wiped out the enrichment would have operated against the plaintiff as well.[24] A defendant who had fallen into *mora* is also liable for *mora*-interest on the sum due.[25]

The effect of the application of these rules is that, under specific circumstances, a person may be compelled to pay compensation in excess of his actual enrichment at that moment, because he has lost the right to invoke the fact that his enrichment has diminished or disappeared. This, however, is not to say that the obligation cannot under those circumstances be considered to be an enrichment liability, but that it must be construed as a liability *ex delicto* or from some other source.[26]

(2) *The enrichment must be at the expense of the plaintiff*

This requirement is as obvious as the preceding one.[27] First of all the plaintiff must be impoverished and furthermore the enrichment and the impoverishment must be interrelated in a particular way.

It is not necessary to consider the question of the impoverishment. It is obvious that impoverishment is the opposite of enrichment and that beneficial events collateral to or coincident with the impoverishment must be taken into account in determining the actual impoverishment.[28] Some attention must, however, be paid to the requirement that the enrichment must be *at the expense* of the plaintiff. This aspect of the matter has been bedevilled by woolly thinking and inadequate analysis since Roman times.

On p. 134 above reference was made to the *actio de in rem verso*, the action by which a *pater dominusve* could be sued on the contract of his son in power or his slave to the extent that performance by the other party had enured to his benefit. It was pointed out that this was not an enrichment action.

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[24] This is an application of the principle that "*mora perpetuat obligationem.*" See Steyn, *op. cit.*, pp. 84–93.

[25] See *Balliol Investment Co., Ltd.* v. *Jacobs*, 1946 T.P.D. 269.

[26] See Von Tuhr-Siegwart, *op. cit.*, p. 427.

[27] See cases cited in footnote 16, p. 242, above.

[28] See Von Tuhr-Siegwart, *op. cit.*, pp. 440, 401, and *cf.* the case of the *bona fide* possessor from whose expense the value of the fruits he has enjoyed is deducted. See pp. 133 and 231 above.

In C.4.26.7.3(1) we, however, find this stated: " But, on the other hand, if you have entered into a contract with a free person who was managing the affairs of the person you mentioned in your letter, and you have extended your credit to him (the manager) you cannot institute an action against his principal, unless the money was applied to his benefit, or he has ratified this contract."

Now, if we leave out of consideration whatever alternative ground of liability might be introduced by ratification, the action mentioned here, to which the name *actio de in rem verso utilis* has been given, cannot be construed as being anything other than an enrichment action, because there is no *potestas* relationship between the principal and the manager; the manager has no *peculium* in the hands of the principal; the manager has a separate, independent proprietary personality and *he had acted in his own name*. Consider, however, how impossible it is to say that the principal has been enriched at the expense of him who contracted with the intermediary.

When an intermediary, X, concludes a contract in his own name with a person, A, and a third person, B, benefits as a result of the performance by A of his obligations, it is impossible to hold that B is enriched at the expense of A. A had made the performance which benefited B towards the person with whom he had contracted, the intermediary X, in fulfilment of his obligations under the contract. In law, he was not the *solvens* towards B. B received the benefit from and at the expense of the intermediary X, whether it be by virtue of a contract with X, or because X wished to act as *negotiorum gestor* towards B, or because X thought he owed the performance to B, or because X wished as it were to make a donation towards B, or for whatever other reason. To be the *solvens* towards B, X had obtained in his own name the right to demand a particular performance from A and either himself applied the performance to the benefit of B or else instructed A to make the performance physically towards B. If B is thus enriched at all, it is at the expense of X. If A is impoverished at all, the person who is enriched at his expense is the person towards whom he, in view of the underlying legal relationship, must in law be held to have made performance, namely X. If A has made performance in terms of a valid contract (as is the position according to the text) his impoverishment is in any event not *sine causa*. The fact which dominates the pattern of rights and duties which arises between the parties is that even when A made his performance physically towards B, two performances were legally made, namely (1) performance by A towards X, and (2) by X towards B.[29]

These rules may be illustrated by a number of simple examples. X buys an article from A, it is delivered to X, and he then donates it to B. If X now does not pay A, A obviously cannot be allowed to institute an enrichment action against B, because B is not enriched at the expense of A. What he has obtained, he obtained from X and what A has lost was lost to X. X completely breaks the necessary relationship between the loss and the gain.[30] The legal position is the same when X did not take delivery of the article he had bought, so that ownership never vested in him, but requested the seller to deliver the article directly to B.[31] We have an analogous position when X, seeing that the dam of his neighbour B, who is on holiday, is in danger of giving way, and wishing to act as *negotiorum gestor* towards B, hires A in his, X's, name, to repair the dam. X incurs a debt towards A so as to have the right to his services and he applies those services in the interests of B. A makes performance towards X, towards whom he is contractually bound. B is thus benefited at the expense of X, not of A. A has his contractual action against X, and X has his action as *gestor* against B. A has no action against B.[32] To allow A an action against B would in any event be a breach of the rule of *paritas creditorum*, the rule that one unsecured creditor may not be accorded rights preferential to other unsecured creditors. Now if A, who is an unsecured creditor of X, is to be allowed to sue B directly, the claim which X had as *gestor* against B for the debt he incurred towards A would disappear, and so a claim, which is an asset in the estate of X and which should have benefited all the creditors of X, is consumed to pay A alone.[33] A final example which must be mentioned is the case where X contracts with B to erect a house for B. X enters into a contract with A that A is to be a subcontractor responsible for the electrical fittings. Obviously, if X does not pay A, A cannot sue B. The reason is not, as has been suggested on occasion by those who instinctively felt that such an action could not be allowed but failed to appreciate the true reason for the necessity to refuse it, that because B has incurred a debt towards A in respect of the building of the house he is not enriched, since it is possible that the value of the house might exceed the contract price and to that extent there *is* enrichment (but not enrichment *sine causa*). Neither is the reason that B was entitled by virtue of a contract to have his house built by X for the agreed amount, because one person cannot invoke a right he has against a specific person to justify his enrichment at the expense of another.[34] If A owes B a sum of money and C pays this sum because he thought that he, C, owed the money to B, B cannot, when C institutes a *condictio indebiti* for the return of the money, plead that A did in any event owe the money to him. The only reason why the subcontractor cannot sue B is that in law it is X and not B who is the *accipiens* of the performance made by him. B is thus not enriched at the expense of A. He may or may not be enriched at the expense of X, and that enrichment is not *sine causa* because it flows from contract.

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[29] *Cf.* Voet, 12.6.9.

[30] *Cf.* the correct attitude reflected in C.4.2.15: "You are obviously wrong when you contend that the creditors from whom you borrowed money should sue, not you, but the heirs of a deceased to whom you, in your turn lent the money." See also the gloss on this.

[31] *Cf.* D.12.4.9.1; 12.6.26.12, *in fine.*

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[32] *Cf.* Windscheid, *op. cit.*, § 431, section 2. There are texts which, in cases where X had given A a mandate to do work for the benefit of B, allow A to sue B directly. These texts do not militate against the view propounded above. They are either (i) texts which deal with the imperfect direct representation of Roman law (see D.3.5.30(31).pr.) or (ii) cases where A did originally intend to act as *gestor* for B so that the agreement subsequently entered into with X is to be construed as a form of personal security. (See D.3.5.11; 3.5.5.3(6.1); C.2.18(19.) 14; *cf.* Inst. 3.26.6.)

[33] See Bregstein, *op. cit.*, pp. 239–240; John, *op. cit.*, p. 99.

[34] See Bregstein, *op. cit.*, p. 226.

This construction of the relationship arising between the parties where an intermediary is concerned which is advocated here is the one which obtains also in Swiss and German law,[35] and it is illuminating to see how French law, which does not demand enrichment of the defendant at the expense of the plaintiff but instead demands an enrichment, an impoverishment and a vague ill-defined " causal relationship," has landed itself into difficulties and has on occasion been compelled to grant actions under circumstances which are very difficult to justify.[36]

In view of the above considerations it is not surprising to find that the Codex-text has puzzled commentators and that various attempts have been made to circumvent it. So we find it said that A has an action against B because he had acted as *negotiorum gestor*[37]—which is equally unacceptable—or that we have here a case of the cession of the action of the intermediary X as *gestor* against B, to A[38]; or simply a denial that the action mentioned in the text can be maintained.[39]

In the Netherlands the protagonist of the *actio de in rem verso utilis* was Ulrich Huber, who wrote on Frisian law. It is remarkable that nowhere in the passages in which he grants an action to a person who had contracted with an intermediary against a third person benefited by that contract, does he invoke the text from the Code.[40]

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[35] See Von Tuhr-Siegwart, *op. cit.*, pp. 400, 429–431; and especially Enneccerus-Lehmann, *op. cit.*, pp. 853–859, for a very lucid exposition. See further Von Lübtow: *Beiträge zur Lehre von der Condictio nach Römischen und Geltendem Recht*, pp. 154–155.

[36] See Challies, *op. cit.*, pp. 83–90, and Bregstein, *op. cit.*, pp. 19, 20, 29 and 30.

[37] See for instance, Brunnemann and Donellus, ad C.4.26.7.3(1); *cf.* Windscheid, *op. cit.*, § 483, footnote 5.

[38] See Windscheid, *op. cit.*, § 483, footnote 5a.

[39] See Noodt, ad D.15.3.

The action is mentioned in an opinion recorded by Schrassert,[41] but according to the somewhat meagre details of the facts of the case there was no intermediary.

In the *Observationes Tumultuariae* of Van Bynkershoek a case is reported where an *actio de in rem verso utilis* was granted, but the action is not named.[42]

The writer has not been able to find any other references to this action in the law of the Netherlands.

When we turn our attention to the South African scene we find that the requirement, that the defendant must have been enriched *at the expense of the plaintiff* so that, where there is an intermediary with whom the plaintiff has contracted, he can have no claim against the third party ultimately benefited, has on occasion been ignored in various ways. So, for instance, we find a number of judgments dealing with cases where a person who had been in possession of an article belonging to another had handed over the possession of the article to a third person with instructions to the third person to repair or maintain the article. The person giving the instructions had in each case acted in his own name, and had contracted with and placed himself under an obligation to the third person. Yet the third person was allowed a *ius retentionis* against the owner until compensated,[43] although it is clear that such a *ius retentionis* can only be exercised if the owner owes money to the person exercising the lien either (a) by virtue of a contract with that person, or (b) by virtue of the fact that he has been unjustifiably enriched at the expense of that person[44]; or if a lien for an enrichment debt, which is a real right, arose prior to the present owner becoming owner so that he took over diminished ownership, ownership subject to a *ius in re aliena*[45] vested in another.

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[40] See Huber's *Praelectiones*, ad D.15.3; *Eunomia Romana*, ad D.15.3. In the *Praelectiones* he mentions the example where X buys corn from A to feed the family of B and in *Eunomia Romana* the example where A lends money to X who lends it to B. In both cases he grants A an enrichment action against B when X fails to pay.

[41] Schrassert: *Consultatiën, Advyzen ende Advertissementen*, Vol. 2, Cons. 53.

[42] *Observationes Tumultuariae*, No. 303

[43] See *Savory* v. *Baldochi*, 1907 T.S. 523; *Ford* v. *Reed Brothers*, 1922 T.P.D. 266; *Phillips and Gordon* v. *Adams*, 1923 E.D.L. 104; *Land Bank* v. *Mans*, 1933 C.P.D. 16.

The most confused line of reasoning in this regard is found in *Holmes Garage* v. *Levin.*[46] In this case it was assumed that where X had contracted in his own name with a garage owner that repairs were to be done to the car of B, and A then, on request of X, paid for the work—*i.e.*, where A had made a loan to X—B was enriched at the expense of A, and that A thus had a lien on the car which had in the meantime come into his possession!

In these cases we thus have a breach of the requirement we are here considering in an indirect way, but in *New Club Garage* v. *Milborrow & Son*[47] an *action* (said to be the *actio negotiorum gestorum contraria*) was actually granted to A against B.

Fortunately for our law, however, sound first principles seem to be gaining ground in this respect and the trend seems to be definitely away from this unacceptable line of reasoning. There is a considerable number of cases in which the courts, while not always reasoning clearly, have refused to hold that the person who had contracted with the intermediary can be allowed to jump across him, as it were, and exercise an enrichment lien or institute an enrichment action against a third person.[48]

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[44] See *United Building Society* v. *Smookler's Trustees*, 1906 T.S. 623; *Colonial Manufacturing Co.* v. *Wiid*, 1927 C.P.D. 198 and the *Phillips* case (previous footnote).

[45] See *South African Association* v. *Van Staden* (1892) 9 S.C. 95; *Corneilssen* v. *Petersen*, 1913 C.P.D. 329.

[46] 1924 G.W.L. 58.

[47] 1931 G.W.L. 86.

[48] See *Colonial Government* v. *Smith* (1885) 4 S.C. 194; *Gillingham* v. *Harris and Morgan*, 1905 T.S. 94; *Vadas (Pty.) Ltd.* v. *Philp*, 1940 C.P.D. 267; *Frame* v. *Palmer*, 1950(3) S.A. 340(C.); *Knoll* v. *S.A. Flooring Industries, Ltd.*, 1951(1) S.A. 404(T.). See also Wessels, *op. cit.*, §§ 3712–3717. In an article published in 1957 *Butterworth's South African Law Review*, pp. 36 *et seq.* under the title "Ongeregverdigde verryking, ten koste van' iemand" the writer dealt at length with this requirement, and also pointed out that under specific circumstances this requirement might lead to hardship and that in certain Codes provision has been made for these cases. It is not possible to deal with the matter in greater detail here.

(3) *The enrichment must be unjustified* (*sine causa*)

The liability will arise only if the enrichment is unjustified, that is to say, if there is no sufficient legal ground to justify the shift of value. In every case where it can be shown that one person has been enriched at the expense of another we must therefore inquire whether there is some legal *causa* to justify the enrichment. If there is such a *causa*, there is no liability.

As examples of justified enrichment there may be mentioned: an enrichment which is the result of an agreement between the parties and to which the law attaches the consequences desired by the parties and which does not miss its purpose, or of which the legal ground does not later fall away (*e.g.*, a valid contract, or a case where something is given under a supposition which is realised or which does not prove to have been erroneous); a shift of value in pursuance of a court order which is not set aside; payment of damages legally due; a transfer of property or other benefit conferred *animo donandi*; or an enrichment allowed by law, such as prescription. Enrichment is also justified when it takes place without contact between the parties, but where it is entirely in accordance with the intention of the person impoverished, *e.g.*, where A spends money on improving his own property and thereby also increases the value of his neighbour's property.[49] This list does not purport to be exhaustive.

The best attempt to state the *sine causa* requirement in the form of what the Germans term an "*einheitliche Formel*," is probably that of Graziani: "When an enrichment results from a shift of value from one estate to another ('vermogensverschuiving'), the enrichment is unjustified if it can be undone without doing violence to the legal norms on the basis of which the shift took place."[50]

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[49] See in general, Grotius, 3.30.10; 14; Windscheid, *op. cit.*, § 422; Van der Leij, *op. cit.*, pp. 69–91; Enneccerus-Lehmann, *op. cit.*, 859–867; Janner: *Wandlungen der Bereicherungslehre in Schweizerischen Recht*, pp. 55–82; Bregstein, *op. cit.*, pp. 221–250; Challies, *op. cit.*. pp. 91–118.

[50] Quoted by Bregstein, *op. cit.*. on p. 249. The author is unknown to the present writer.

There are also other formulae,[51] but it is to be doubted whether the *sine causa* requirement can be expressed in a truly satisfactory, comprehensive formula.[52] In any event it does not appear that this requirement is likely to give rise to great problems in practice.

(4) *The case must not fall under one of the classical enrichment actions*

It has already been pointed out that the classical enrichment actions survive with undiminished vigour in our modern law. The rules of the old actions are still applied to cases falling within the scope of the old actions. The general enrichment action exists side by side with the old actions, and provides relief under circumstances not covered by them. The writer has pointed out the desirability of the general action absorbing the old actions, so as to give us a few simple principles in place of the Joseph's coat we have at present. The present general action, however, has a subsidiary character, inasmuch as its application is limited to cases falling outside the scope of the old actions. Thus, if the facts of a particular case clearly bring it under, shall we say, the *condictio indebiti*, and the rules of that action deny a remedy because the *solvens* paid *per errorem iuris*, the *solvens* cannot invoke the general action.[53]

(5) *There must be no rule of law which, in spite of the requirements* (1)–(4) *above being fulfilled, prevents the person impoverished from recovering*

It is obvious why a person at whose expense someone else had "made a bargain," let us say, by buying from him an article at much less than its true value, or a person who had transferred property to another *animo donandi*, cannot succeed in an enrichment action—the enrichment is not *sine causa.* But why cannot a person who had made performance in terms of an immoral agreement and whose performance is itself held to have been *turpis*, reclaim what he had given?[54] Must the element of *turpitudo* be looked upon as a *causa* which the law considers to be sufficient justification for the enrichment of one for whom it was equally *turpis* to have received? Why cannot a thief, who has improved the property he has stolen, claim the value of the improvements from the vindicating owner?[55] Must the bad faith of the thief be held to be a legal ground justifying the enrichment? Why are the rights of compensation of a lessee so much more limited than the rights of a *bona fide* possessor or even a *mala fide* possessor,[56] why are the rights of compensation of the usufructuary so much more limited than those of a fiduciary,[57] and why is a person who made a *solutio indebiti per errorem iuris* in general denied a *condictio indebiti*?[58]

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[51] See Van der Leij, Bregstein and Challies, *loc. cit.*, in footnote 49 above.

[52] See Windscheid, *op. cit.*, § 422; Enneccerus-Lehmann, *op. cit.*, p. 859; John, *op. cit.*, p. 154; and *cf.* the monograph of Janner, cited in footnote 49.

[53] "Our law, relating to condiction . . . is essentially Roman," *per* Van den Heever J. in *Pucjlowski* v. *Johnston's Executor*, 1946 W.L.D. on p. 3.

The writer feels that the denial of a claim in these cases cannot be explained by saying that the enrichment is not *sine causa.* To say that that is the reason why the enrichment liability is excluded or limited in these cases, would be arguing in a circle, which would rob the *sine causa* requirement of all significant content. It would in effect be saying that there is no liability if the enrichment is not *sine causa*, and that the enrichment is not *sine causa* when there is no liability, since there is no other ground of justification to be indicated.

If, however, we construe the *sine causa* requirement as was done in (3) above and say that enrichment is not *sine causa* when there is an element present which is a positive legal ground sufficient to *justify* the enrichment—in other words, when the enrichment, *looked at from the side of the person benefited, is justifiable*—it is obvious that an additional requirement for enrichment liability must be postulated. This requirement then is that the person impoverished must not be prevented by a positive rule of law, based on legal policy, public interest, considerations of morality or any other relevant considerations, from recovering. It can hardly be denied that the cases of enrichment mentioned above must be considered examples of unjustified enrichment. On account of other considerations, however, the person impoverished is denied the right to recover; the person enriched incurs no liability towards him.[59]

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[54] See p. 226, above.
[55] See Voet, 6.1.36 and 13.1.6.
[56] See p. 140, above.
[57] See *Brunsdon's Estate* v. *Brunsdon*, 1920 C.P.D. 159.
[58] See p. 226, above.

This requirement then is found in the case of the old enrichment actions. The examples which have been cited above are all examples of cases where, had there been an action, it would have been a classical action. It is obvious, however, that if we concede the validity of this requirement, then on general principles it must be held to be a requirement for the general enrichment liability as well, and this is indeed the case. This rule then explains why a deserting servant, or a building contractor who has *mala fide* departed from the terms of the contract, can claim no compensation whatsoever, not even on the basis of enrichment.[60]

(d) *The nature of the obligation*

The requirements set out above determine whether in a particular case the general enrichment liability has come into existence or not.

In the vast majority of cases the liability will consist of the duty to pay a sum of money and this sum of money will represent either the enrichment or the impoverishment, whichever is the lesser of the two. Under exceptional circumstances, which we cannot consider here, the person enriched may, however, be allowed to reject his enrichment, by, for instance, giving an occupier who has erected a building on his land the right to remove what he has put up instead of discharging his enrichment debt by paying a sum of money.

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[59] *Cf. Pretorius* v. *van Zyl*, 1927 O.P.D. on p. 229. It will be noted it was said that in the case of prescription there is no action because the enrichment is not *sine causa*. The writer thinks there are reasons for interpreting the position thus rather than saying that it is rule (5) which precludes an enrichment liability. Lack of space prevents an elaboration of this point.

[60] See pp. 235 and 233 above.

The reason for the statement that in the vast majority of cases the liability will be the duty to pay a sum of money is that usually, where the enrichment consists of the acquisition of the ownership of an article so that the duty is to retransfer the article, the case will fall under one of the old actions, and not the general action. In such a case, even if the article can no longer be given back, and the liability becomes a money debt, we shall still be dealing with one of the old actions.[61] There are exceptional circumstances where the obligation under the general action might also be the duty to transfer ownership of an article, but it is not necessary to weary the long-suffering reader with a technical discussion to elucidate this point.

WOUTER DE VOS.

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[61] See p. 131 above.

THE STIRLING PEERAGE CASE

FORGERY and fraudulent claims to titles of honour are not crimes which normally outrage the moral feelings of the lieges. Indeed the audacity and technical skill of the forger tend to attract at least a grudging sympathy for the criminal rather than the victim; and the romance of rags-to-riches which is often present in peerage claims transforms a crime into an interesting and exciting peccadillo whose moral turpitude is inversely proportional to the magnitude of the claim. In the Stirling peerage case —which occupied the courts from 1820 to 1868—all these features were present—forged charters and maps, extinct titles and a claim to huge tracts of land in North America.

The claim

The extent of the claim was unprecedented. It included not merely the Scottish earldom of Stirling, together with £10,000 (with interest from 1633), but also the " lordship," or political sovereignty of Canada and the proprietorship of hundreds of square miles of land in North America. These included the present maritime Provinces of Canada, parts of Quebec and Ontario, the state of Maine, the Great Lakes, California, a corridor of one hundred leagues wide from the Great Lakes to the Gulf of California, Long Island, Martha's Vineyard and Nantucket.[1]

There had been an earlier claimant to this valuable heritage in the person of an American colonist, William Alexander, who was Surveyor-General of New Jersey; but his claim was thrown out by the House of Lords in 1762.[2] A few years later the Surveyor-General took up arms against the British in the American War of Independence.

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[1] Earl of Stirling, *Oppressive Proceedings* (1834), *passim*; *RMS*, viii. 226, 1202; Letters patent of April 22, 1635.

[2] *House of Lords Journals*, xxx. 186; Robertson, *Peerage* (1790), 286–287, 299, 306–307.

The nineteenth-century claimant was Alexander Humphrys. He had been a schoolmaster in Worcester. During the later part of the Napoleonic War he had been interned by the French. While in France he married a Neapolitan lady and became acquainted with a friend of his wife, Mlle. Normand. After his return to Britain Humphrys became interested in the earldom of Stirling and ultimately set out to claim it.[3] As a result he managed to pose as the Earl of Stirling for fourteen years. In keeping with his new station in life he set up house in Baker Street. Appropriate titles were conferred on his family, his mother becoming the Dowager Countess. He created Nova Scotia baronetcies on his own authority. He voted three times at the election of Scottish peers.[4] When Lord Durham was appointed Governor-General of Canada, Humphrys entered a protest that this creation was an infringement of his title of Hereditary Proprietor and Lieutenant of Canada.[5] Humphrys also wrote addresses to his " subjects " in Canada, and sent agents to the United States to assure the inhabitants that he would confirm them in their land titles. Twice he vindicated his immunity as peer from imprisonment for debt.[6] On the strength of his expectancy of millions of acres in Canada Humphrys raised a large number of loans: one agent raised £13,000 in a year. However, the whole edifice rested on the doubtful premise that Humphrys was the true heir of the first Earl of Stirling.

The Scottish Empire

The first Earl of Stirling, while he was still Sir William Alexander of Menstrie, had been Secretary of State to James VI. Sir William was a poet of some reputation but he also had a desire to plant a Scottish colony in the

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[3] In 1815 an English solicitor had declined to act in the claim because of the lack of evidence.

[4] Register of Election of Peers.

[5] *Oppressive Proceedings, passim.*

[6] *Digby* v. *Alexander*, 8 Bingham 35; 9 Bingham 416; *Stirling* v. *Clayton*, 3 Tyr. 154; *Stirling* v. *Smith and Chapman* (1836) 14 S. 221.

Americas and thus to match New England, New France and New Spain with Nova Scotia. His aims were expounded in a little volume, *An Encouragement to Colonies.*[7] The King was interested in the projected Scottish Empire which was to be planted in Eastern Canada. The cost of the enterprise was not to fall on the King or his minister but was to be defrayed from the sale of Nova Scotia baronetcies. The baronets undertook to plant the colony with a quota of soldiers and servants and each baronet was granted an extensive tract of land in Canada as a barony.[8]

James himself died before any baronets had been created, but his son, Charles I, carried out the original plans. In his reign over 120 baronetcies were created; and by a series of charters Sir William Alexander was raised in the peerage as Earl of Stirling and Dovan. The Earl was also created hereditary Proprietor and Lieutenant of Canada.[9] Additional lands to the south, in the English settlements, were gained by negotiations with the Plymouth Company.

The fate of this Scottish Empire is of little concern here.[10] Two ill-equipped expeditions were sent out, but they achieved little. Soon Charles was engaged in the struggle with the English Parliament and thereafter the three kingdoms were engulfed in the Civil War. Charles cut his losses by ceding Nova Scotia to France[11] and by promising the Earl of Stirling compensation of £10,000 —a promise which characteristically he never carried out.

There was some doubt as to what Charles had actually ceded to France and in any event the whole of Canada was reconquered from the French in the course of the eighteenth century. The immediate heirs of the first earl showed little interest in Nova Scotia and the male line died out in the person of the fifth earl in 1739.[12] Apart from the American claim of 1760 the matter rested until 1825 when Alexander Humphrys voted as Earl of Stirling at the election of Scottish peers.[13]

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[7] Bannatyne Club (1867).

[8] *RPC*, xiii. 616–617, *etc.*; *Royal Letters Relating to the Colonization of New Scotland*, Bannatyne Club (1867), *passim.*

[9] *RMS*, viii. 825, 1653, 2173.

[10] "The Baronets of Scotland and Nova Scotia" (1913) 25 *Juridical Review* 333.

[11] Treaty of S. Germains, 1632.

[12] *Scots Peerage*, viii. 183.

The evidence

Formidable difficulties faced Humphrys before his claim to be Earl of Stirling received universal acceptance. All the extant charters in favour of the first earl had been to him and "his heirs male bearing the name of Alexander." The latter condition was soon satisfied: in 1824 Humphrys was granted a royal charter permitting him to use the surname, Alexander—which had been his mother's maiden name. His unbroken descent from a son of the first earl was spoken to by affidavits of aged witnesses in Ireland, by tombstone inscriptions, and by Bible genealogies. Most important he produced an excerpt[15] of a charter of December 7, 1639, which purported to re-grant all those titles and lands to the first earl to him and his heirs whatsoever.[16]

Armed with this evidence Humphrys had himself served as heir to the first earl.[17] He also raised an action of proving the tenor of the excerpt charter.[18] At this point the Crown intervened. The Colonial Office had declined to admit Humphrys' claims for the £10,000 with 200 years' interest. The Crown had ignored his petition to do homage as Lieutenant of Nova Scotia at the coronation of William

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[13] Register of Election of Peers, iii. 228. A vacancy had been caused by the death of the Earl of Balcarres.

[15] Humphrys alleged that the American claimant had made off with all the papers including the principal charter.

[16] The significance of the date of this charter is not hard to seek. Vol. 57 of the Register of the Great Seal, in which Crown charters were engrossed, is wanting a few pages and the gap extends to December 1639. It was partly on this defective volume that the recent Wedderburn peerage case was founded: *Dudhope Peerage*, HMSO (1952), 17 *et passim.*

[17] The services which were before the bailies of Canongate were (a) heir in general to the first earl, October 11, 1830, rec. October 16, 1830; (b) heir of tail of "Pro Ge." May 30, 1830, rec. June 1, 1830; and (c) heir in special in Nova Scotia, July 2, 1831, rec. July 7, 1831.

[18] *Alexander* v. *Lord Advocate* (1830) 8 S. 404; *Alexander* v. *King's Advocate* (1830) 8 S. 634; *Stirling* v. *Officers of State* (1831) 9 S. 413; *Stirling* v. *King's Advocate* (1833) 11 S. 506.

IV. The government appeared to be moved by the implications of Humphrys' claims. There were already civil troubles in Quebec and Ontario without the intervention of a rival governor-general. And Roseberry and other peers were protesting vociferously against Humphrys' intrusion into the nobility. Accordingly the Crown raised actions to reduce Humphrys' services and the excerpt charter.[19] After six years' litigation the Crown was successful—but the court reserved to Humphrys the right to produce new evidence in support of his claim. The shaky financial structure of Humphrys' claim had become worse with the added expense of several years' litigation. That and no doubt the taste for gracious living spurred him on to discover new evidence in support of his claim. Accordingly, he retired to Paris and there renewed his longstanding friendship with Mlle. Normand.

Mlle. Normand, who was aged about seventy, was a high-class fortune teller. She was an authoress of sorts, having produced a volume entitled *The Prophetic Memories of a Sibyl.* But she was also something of an antiquary with a particular interest in ancient maps and documents. After a few months in Paris Humphrys returned to Edinburgh with certain documents. Other papers arrived by post with the compliments of "Mrs. Smyth." Among the papers was an old map of Canada made by William Delisle, Geographer to Louis XV. The map purported to show the Canadian lands of the Earl of Stirling; on the back were the docquets of eighteenth-century notables including the Archbishop of Nîmes, Fénélon, the royal tutor, and Louis XV himself. The authenticity of the docquets was certified by the Keeper of the General Archives of France.[20] This additional documentary evidence was lodged in process on behalf of Humphrys. But the court, or more likely the

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[19] *Officers of State* v. *Stirling* (1833) 11 S. 625; *Officers of State* v. *Alexander* (1835) 13 S. 1044; *Officers of State* v. *Alexander or Humphrys* (1839) 1 D. 1188.

[20] All these matters were spoken to at length in the subsequent trial of Humphrys: Swinton, *Trial of the Earl of Stirling* (1839); Turnbull, *Report of the Trial of the Earl of Stirling* (1839).

Crown, had doubts about the authenticity of the new evidence. Humphrys was judicially examined on the documents and their provenance and as a result was indicted on a charge of forgery to be tried in the High Court of Justiciary.[21]

The trial

The trial of the Earl of Stirling for forgery, which took place on April 29, 1839, and lasted five days, was not only a social occasion[22] but also a notable concourse of high judicial and historical talent. On the bench were Lords Meadowbank, Mackenzie, Moncreiff and Medwyn. The Crown was represented by the Solicitor-General (Rutherford), and by Cosmo Innes, the celebrated historian and antiquary, and by Robert Handyside, later Lord Handyside. The panel was represented by Patrick Robertson, Adam Anderson and John Inglis. Among the witnesses were two giants of the historical archives—M. Teulet, Joint Secretary of the Archives of France and Thomas Thomson, Deputy Clerk Register. There was also a host of witnesses skilled in chemistry, lithography and paleography from both France and Scotland.[23]

In the face of such testimony the authenticity of the documents was never seriously maintained by the defence. The forgeries had deceived a single French authority but they could not withstand the closer scrutiny of a dozen experts who had the resources of the state behind them. The alleged charter or excerpt of 1639 fell first. In this the forger had made an understandable error. The missing leaves of volume 57 of the Register of the Great Seal were resurrected by reference to the Indexes and to the Register of the Privy Seal but no entry corresponding to the excerpt was found. Further, the excerpt bore to be witnessed on December 7, 1639, by John [Spotswood] Archbishop of St. Andrews and Chancellor of Scotland. In point of fact Spotswood had ceased to be Chancellor on November 13, 1638, and had actually *died* eleven days before the alleged date of the charter.[24] Other technical points of Scottish conveyancing together with the handwriting evidence showed unquestionably that the charter was a forgery of recent date. Similarly with the map of Canada. It was shown that whereas the map was dated 1703 and designed William Delisle as *Premier* Geographer of Louis XV he was (until 1718) in fact only *Geographer*. It was also shown that two of the notables whose docquets were on the back of the map had died some time before the purported dates of their signatures. Chemical evidence and the evidence of paleographers confirmed that the map was also a recent forgery.

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[21] The action of the Crown in instituting a criminal prosecution in the course of civil proceedings to which it was a part was severely commented upon in the Lords: *A. F. W. Alexander* v. *Officers of State* (1868) 6 M.(H.L.) 54.

[22] "The court was crowded to excess, a great proportion of the audience being ladies who no doubt expect the details to be highly interesting and curious; and a like expectation is said to prevail not only in this country but in Paris, the United States and more especially in Canada, the Lordship of which vast territory the accused considers as affected by his claim. . . . The intensity of interest seemed rather to increase than diminish. . . . The audience did not consist as in ordinary criminal trials of a promiscuous mixture of all ranks and degrees of the community. It was a case in which the lower ranks seemed not to sympathize and accordingly the court was occupied chiefly by ladies and gentlemen, many of whom had come from a distance to be present at this interesting trial": *Glasgow Herald.*

[23] The trial must have been one of the first which proceeded almost wholly on the evidence of experts. Humphrys waived his right as a peer to be tried by a jury of landed men and chose a common jury instead.

The remaining documentary evidence was dealt with in the same way. As the trial proceeded cross-examination of the Crown witnesses decreased. The defence called only six of the twenty witnesses. The overwhelming evidence of the Crown barely required an address from the Solicitor-General—except to establish the panel's guilt in uttering the forgeries. The closing speech for the defence was one in which oratory took the place of any significant reference to the evidence. Counsel confined himself to an impassioned plea on behalf of the honesty and integrity of his client:

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[24] The error probably arose from an uncritical perusal of the list of the chancellors of Scotland which normally shows Loudon in 1641 as the next chancellor after Spotswood, whereas after Spotswood the chancellorship was exercised by a commission.

> Without truth, integrity and honour, titles and distinctions are worse than nothing. Without these, the glitter of the coronet hath no splendour in my eye. On the tarnished ermine I trample with contempt. Do not, gentlemen—do not add to the pangs of this man more than he deserves. Leave him in possession of that character which he has hitherto enjoyed . . . for in my conscience I believe him innocent of the crimes here charged, and to have been merely the dupe of the designing, and the prey of the unworthy.

After Lord Meadowbank's charge, the jury retired for five hours. The jury's verdict was that the excerpt charter and the map were forged, that it was not proved that the other documents were forged and that it was also not proved that Humphrys had uttered the documents knowing them to be forged. Before the verdict had been completely delivered the public benches burst out in applause and the court was cleared " with some difficulty." [25] Humphrys himself fainted and had to be carried out of the court.

Even after the prosecution Humphrys proceeded with his civil litigation [26] and after his death his son carried on the action.[27] The case went to the Lords in 1868—twenty-nine years after the trial and forty-three after Humphrys had first voted at the election of peers. Even in 1868 the matter was not settled conclusively: their lordships held that Humphrys' evidence was insufficient to support his services but it was left open for new evidence to be brought.

It remains a question whether Humphrys was as honest and sincere as his counsel pleaded. The most likely case is that Humphrys was honestly convinced of the fundamental truth of his claim but left the donkey work of proving it to others and did not inquire too closely into their methods. By the time of the trial he must have known of the falsity of his evidences. It may be, however, that Humphrys was a plain rogue—one of that crop of adventurers of the early nineteenth century who like Tichborne relied on the ambiguities of dormant titles or, like Gregor McGregor, " Prince of Poyais " in central America,[28] made use of the promise of wealth and the glamour of the New World. Humphrys had the benefit of both a misty peerage claim and an even more shadowy right to land in Canada. But the buccaneering days of Raleigh and the first Earl of Stirling had long since gone and their place had been taken by a world in which the evidence of chemical tests and expert paleographers could destroy an empire.

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[25] *Glasgow Herald.*

[26] *Officers of State* v. *Alexander or Humphrys* (1839) 1 D. 1188; (1845) 7 D. 884.

[27] *Officers of State* v. *A. F. W. Alexander* (1864) 2 M. 1294; (1866) 4 M. 741; (1868) 6 M.(H.L.) 54.

PETER G. B. MCNEILL.

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[28] *History Today*, ii. (1952), 53–58.

CASES AND COMMENT

1. SCOTTISH CASES

DELICT—Limitation of actions—Commencement of period.

In *Watson* v. *Winget, Ltd.*, 1960 S.L.T. 169; 1960 S.L.T. 321, the issue was the *terminus a quo* for the running of the three-year period of limitation of actions claiming damages for personal injuries under the Law Reform (Limitation of Actions) Act, 1954. The pursuer was injured on August 9, 1956, by the breaking of a defective part of a cement mixing machine supplied by the manufacturers on July 7, 1955. He claimed damages from his employers, who blamed the manufacturers, and he accordingly called the latter as second defenders. The second defenders were brought into the process of March 31, 1959. From which date, supply or breakage, did the three-year period run? Lord Wheatley held that the "act, neglect or default giving rise to the action" was the breakage and that the period of limitation ran from that date, and not from the date of manufacture. The action could therefore go on against the manufacturers. The Second Division reversed this decision, and accordingly assoilzied the second defenders as being protected by the limitation section. The House of Lords subsequently, by three to two, reversed the Court of Session on the ground that it is "the doing of damage to [the pursuer] which . . . is the breach of duty giving rise to the action." The division of opinion in this case is significant, with an overall majority of judges holding the view which has not, in the end, prevailed. The simplest view seems to be that the defenders' "neglect or default" consisted in supplying a defective machine. On that view they would be liable if an accident happened in consequence and they were cited in an action brought within three years of supply. On the other view the "neglect or default" consisted in the breaking of the defective part and consequential injury. On the first view, if the machine were not used, or if the breakage did not take place, for four years, the defenders would be free. On the second view they might be liable for a breakage ten years after they supplied the machine (if the breakage were due to inherent defect and not lack of maintenance, inspection or repair).

The Lord Ordinary, and, in the end, the House of Lords, adopted the view that " act, neglect or default giving rise to the action " points to the time when the right to raise an action for damages has emerged, that is, when the defenders' negligence is completed by the occurrence of damage to someone. This view derives some support from the cases interpreting the Public Authorities Protection Act, 1893, which the 1954 Act repealed and, to some extent, replaced, and from the overriding purpose of the 1954 Act, which was to prevent stale claims and enforce reasonable diligence in pursuing damages claims which emerged, not, as in the case of the 1893 Act, to protect particular defenders after the lapse of a short time. It was also argued that " act, neglect or default " was synonymous with legal negligence, which occurs only when breach of duty causes injury or damage. This contention seems adequately rebutted by the observation of the Second Division that Parliament did not mention " negligence " and that the words used are not necessarily synonymous with legal negligence, which is a complex concept in which default or neglect is only one element. On the other hand section 2 (1) of the Act, making the corresponding change in the law of England, does refer to " actions for damages for negligence."

On the whole matter, it seems to the commentator that the view of the Second Division is more apt than that of the House of Lords to give to the words used in the Act their plain, ordinary and obvious meaning. If the consequence of giving that meaning to the words is that the pursuer fails, or that a defender becomes protected from action for supplying defective machinery by the passage of three years, that is unfortunate. The view of the House of Lords on the other hand may be better calculated to give effect to the general purpose of the Act but it is highly doubtful if it is the fairer interpretation of the words actually used. Parliament has, not for the first time, not been very successful in trying to embody a clear idea in words.

D. M. W.

Inland Revenue v. *Hood Barrs*, 1960 S.L.T. 278; 1959 S.C. 273, illustrates the unsatisfactory consequences which still flow

INTERPRETATION—English terms in Scottish Acts.

from the unequal union of 1707. The Act of 1707 which established the Court of Exchequer in Scotland endowed it with English powers including, *inter alia*, the power to issue writs of certiorari in circumstances where they would have been issued under English law. This power was transferred to the Court of Session when the Court of Exchequer was abolished in 1856, it being provided that the Court of Session was to have power to quash revenue proceedings in circumstances where the Court of Exchequer could then have issued a writ of certiorari. The First Division was therefore faced with the problem of deciding whether they could entertain the appeal, and inferentially of considering the scope and application of the distinctively English remedy of certiorari and of whether the proceedings of the General Commissioners of Income Tax were administrative (and hence outwith the remedy) or quasi-judicial (and hence within the remedy). The matter was further complicated by the repeal in 1948 of the original empowering section of 1707.

The court held that this repeal did not affect the transfer of Exchequer jurisdiction to the Court of Session and the transmutation of forms then effected, but merely abolished the spent and now useless procedural framework of 1707, that the proceedings of the Commissioners in question were quasi-judicial rather than administrative and accordingly amenable to certiorari, and that in the circumstances they should be quashed as being in breach of the principle *audi alteram partem* and also as disclosing errors of law on the face of the record.

What is so unsatisfactory about this case is its revelation of the way in which Scottish courts may be forced to seek to interpret and apply distinctively English doctrines of great complexity, and how this disgraceful Act of 1707 can still rule us from the grave and compel the consideration of alien law which Scottish courts do not profess to understand. The actual disposal of the case seems correct; it is the state of the law which is unsatisfactory. The abolition of these prerogative orders and their replacement by a simple right of appeal is overdue.

D. M. W.

Harvey v. *Singer Manufacturing Co., Ltd.*, 1960 S.L.T. 178, has clarified a point on delictual liability. It being accepted that

NEGLIGENCE —Liability— Extent of foresight demanded of defender.

the test of liability or no liability is whether the occurrence of loss, injury or damage by reason of the defenders' conduct was foreseeable, need that foresight be particular, *i.e.*, of precisely what later happened, or only general, *i.e.*, of the kind or class of accidents, one of which has happened? The facts of the case are not material; the crucial contention was that of the defenders, that the foresight demanded should be limited to foresight of the happening of the accident to a person operating the machine, and not to a person demonstrating the machine to an inexperienced assistant (as had befallen). The Second Division seems manifestly right in taking the view that the issue was not whether the defenders could and should reasonably have foreseen the precise kind of harm and the precise context of the accident which eventually happened, but whether they could reasonably have foreseen that the use of the machine created a potential danger, *i.e.*, that there was a risk of that kind of accident happening to somebody. It is sufficient for liability " if the accident is of the type they should have foreseen and guarded against, if at the time of its happening the injured person was a person who should have been guarded against the danger, and if the particular accident is such that it would have been avoided by the precautions which a reasonable employer would have foreseen as necessary and would have taken " (Lord Patrick). This seems both good law and good sense.

D. M. W.

Patterson v. *Nixon*, 1960 S.L.T. 220, is a further illustration of the extension of the modes of securing admissible evidence. At the trial of a panel on a charge of housebreaking evidence was given as to the conduct of a tracker dog by its handler and by police officers. The narrative of facts contained in the stated case is both interesting and instructive, as showing the precautions which should be, and were, taken in such a case and the care with which the tracker dog's identification was tested.

EVIDENCE— Admissibility— Conduct of tracker dog.

The evidence was held to be both admissible and sufficient to justify conviction when taken in conjunction with the panel's statements.

The Lord Justice-Clerk, delivering the opinion of the High Court, pointed out that the value and significance of the dog's conduct, as spoken to by its handler and other police, was a question of circumstances in each case, that in the circumstances its conduct was unambiguous and pointed clearly towards identification of the panel with the person who had stood on the rugs and otherwise left his scent in the premises burgled, and that it was sufficient, taken along with the panel's semi-admissions, to justify conviction.

D. M. W.

EVIDENCE—Admissibility—Radio transmission of conversation.

Evidence also figured in *Hopes* v. *H. M. Advocate*, 1960 S.L.T. 264. Two men were charged with extorting money by verbal threats; the man threatened complained to the police, and under their instructions met one of the blackmailers in a public place, equipped with marked pound notes and a microphone in the lapel of his coat. His conversation with the blackmailer was transmitted to a receiver, loudspeaker and tape recorder set up by the police in a convenient room, from which they could hear the conversation. Objection was taken to the admission of evidence by a police constable of what he had heard over the loudspeaker. This objection was repelled on the ground that the sounds were merely conveyed to the witness by a scientific apparatus rather than heard naturally and that this no more affected the admissibility of the evidence than did the use of spectacles or a telescope. There might be room for argument on the audibility or intelligibility of what was transmitted, but apart from that, the evidence was admissible. This view the High Court upheld on appeal.

More difficult was the objection to the evidence of a shorthand typist who took down and reduced to writing the playback of the recorded transmission of the blackmailer's conversation. Her version was the result of repeated playing back of the tape and was really a reconstruction by her of what the conversation in her view must have been. The High Court, on appeal, found it unnecessary to come to a definite conclusion on the competency of her evidence, there being sufficient from other sources to sustain the conviction. The indications of opinion were, however, that the evidence was admissible, so long as both the recording and the edited transcript were put in evidence and the jury was told that the recording was the evidence and the transcript merely provided for the convenience of the jury and to avoid having to play the recording repeatedly until the jury had adequately made it out. To play back the tape-recording to the jury, several times if need be, is surely competent, as that is no more than to ask a mechanical witness to repeat what is stored in its memory, and the jury could certainly ask a human witness to repeat what his human memory recorded, but to admit an edited transcript, however convenient and time-saving, seems to be going rather far. It would not be admissible in the case of a human witness whose speech was incoherent. Should it have been admitted in this case? The issue is still open for consideration again and it requires further consideration.

D. M. W.

SPECIFICATIO—Stolen property—Whether defect in title purged.

In *McDonald* v. *Provan* (*of Scotland Street*), *Ltd.*, 1960 S.L.T. 231, F. constructed a motor-vehicle by welding together the front part of one vehicle to the back part of another: one of the vehicles had been stolen by F. or an associate of his. The composite vehicle was bought in bona fide by P. and sold by P. to McD. Three months later the police took away the vehicle as stolen property, and McD. sued P. for damages for breach of the implied condition of right to sell and breach of the implied warranty of buyers' quiet possession (Sale of Goods Act, 1893, s. 12). The defence was based on the contention that F., by making a composite vehicle had acquired a good title thereto under the doctrine of *specificatio*, purged of the *vitium reale* of theft, and that this good title had been transmitted by F. to P. and by P. to McD. This defence was repelled on the ground that *specificatio* was an equitable doctrine which could be invoked only in cases of good faith; it could not confer a title where some of the materials used in making the new species were stolen; the taint of *vitium reale* continued to attach to the new species. This is consistent both with earlier cases on *specificatio* where the mixing of properties had been done in good faith, and with the cases on stolen property which show that the *vitium reale* inheres in the stolen property notwithstanding later transfers in good faith. To have decided this case in the contrary way would have made a large loophole in the doctrine of *vitium reale* and been bad policy, as well as contrary to the authorities.

D. M. W.

REPARATION —Title to sue— Executor.

For nearly fifty years *Leigh's Exrx.* v. *Caledonian Ry.*, 1913 S.C. 838; 1913 1 S.L.T. 373, has been authority for the proposition that an executor might not only continue an action brought by an injured person after that person's death but might even initiate an action in such circumstances if the injured person had intimated a claim of damages before his death. The decision was an anomaly and was heavily criticised by the House of Lords in *Stewart's Exrx.* v. *L. M. S. Ry.*, 1943 S.C.(H.L.) 19; 1944 S.L.T. 13, where its correctness was not, however, directly in issue. The matter has, however, now arisen again, and in *Smith's Exor.* v. *Duncan Stewart & Co., Ltd.*, 1960 S.L.T. (Notes) 62, a court of seven judges has overruled *Leigh's Exrx.* and condemned it as a bad decision. This clarifies the law; in future, if an injured person dies without having initiated his action for damages, whether he has made a claim or not, the title to sue will vest, not in his executor, but in any entitled surviving relatives, and their claim will be for solatium and patrimonial loss caused to them, not to the deceased. This decision is to be welcomed, but further comment must await publication of the full report.

D. M. W.

2. ENGLISH CASES

FRUSTRATION OF ADVENTURE —Blocking of the Suez Canal.

"Frustration of Adventure" may be regarded as a proper description of the Suez affair but it has also illumined the law of contract under this topic and appears to have caused as much litigation as the sudden cancellation of King Edward VIIth's coronation. In *Société Franco Tunisienne D'Armement* v. *Sidermar* [1960] 3 W.L.R. 701, a charterparty for the carriage of iron ore from India to Geneva was held to have been frustrated by the blocking of the Suez Canal because, having regard to the express provisions of the contract and the surrounding circumstances, it was a term of the contract (whether express or implied) that the vessel was to go by the Suez Canal route.

The alternative route by the Cape of Good Hope was so circuitous and different in a number of respects that it was to be regarded as a fundamentally different voyage. It was also observed that the possibility, appreciated by both parties, at the time of making the contract, that a certain event might occur, did not necessarily prevent the frustration of the contract by that event when it did occur; it was one of the surrounding circumstances to be taken into account in construing the contract, and had a greater or less weight according to the degree of probability or improbability and all the facts of the case.

W. A. E.

DANGEROUS MACHINERY—Fencing—Factories Act, 1937, s. 14 (1).

The case of *Close* v. *Steel Company of Wales, Ltd.* [1960] 3 W.L.R. 401 considerably narrows down the decision in *Carroll* v. *Andrew Barclay & Sons, Ltd.*, 1948 S.C. (H.L.) 100; 1948 S.L.T. 464; [1948] A.C. 477, where it was held that the duty to fence dangerous parts of machinery enjoined by section 14 (1) of the Factories Act, 1937, did not apply to the case of things being ejected from the machine. *Close* now distinguishes *Carroll* on the ground that the latter decision applied only to flying or ejected pieces of material being worked in the machine. In *Close* it was an actual piece of the machine which was ejected, namely a piece of an electric drill, and it was held that the section did apply. On the evidence, however, the risk of grave injury was not reasonably foreseeable and therefore the piece in question was not " a dangerous part of . . . machinery " within the scope of the statutory duty.

Another recent case interpreting the same section of the Factories Act is *Cherry* v. *International Alloys, Ltd.* [1960] 3 W.L.R. 568. An experienced mechanic was injured by the revolving fan of a factory truck. The Court of Appeal held that this was not " machinery " within the terms of the section.

W. A. E.

CONTEMPT OF COURT—Pending proceedings.

R. v. *Duffy and Others* [1960] 3 W.L.R. 320, emphasises that criminal proceedings are still pending after trial and before the case has been disposed of by the Court of Criminal Appeal. They may also still be pending in England (though not in Scotland) if there is an appeal, under the Attorney-General's fiat, to the House of Lords. Accordingly, newspaper articles published during these periods may be in contempt of court. In the present case, however, it was held that an article published while a case was under appeal to the Court of Criminal Appeal was not in fact likely to influence the judges who would hear the appeal. As it was not therefore calculated to prejudice a fair hearing, it did not constitute contempt of court.

W. A. E.

SAFE SYSTEM OF WORK—Whether proper alternative system requires to be pleaded or proved by the plaintiff.

It remains to be seen whether the decision in *Dixon* v. *Cementation Company, Ltd.* [1960] 1 W.L.R. 746 will be acceptable in Scotland with our somewhat stricter rules of pleading. In *Dixon* the plaintiff was injured when working with a fellow workman in a confined position in a tunnel where he required to work with his eyes only a foot or so from a nail which his workmate was endeavouring to hammer home. Owing to a glancing blow from the hammer the nail flew out and struck him in the eye. He maintained that the defenders' system of working was unsafe but without specifying or proving what a safer system of working should comprise. The Court of Appeal held (affirming the decision of Diplock J.) that it was not necessary in every case where an unsafe system of work was alleged for the plaintiff to undertake the burden of pleading and proving an alternative system of work which could have been adopted and which would have been safe. It was observed, however, that there were still cases like *Colfar* v. *Coggins & Griffith (Liverpool), Ltd.* [1945] A.C. 197 where a plaintiff could not get far without showing a reasonably practicable alternative.

W. A. E.

PEDESTRIAN CROSSINGS REGULATIONS, 1954.

Regulation 4 of the Pedestrian Crossings Regulations, 1954, provides that " every foot-passenger on the carriageway within the limits of an uncontrolled crossing shall have precedence within those limits over any vehicle and the driver shall accord such precedence to the foot-passenger, if the foot-passenger is on the carriageway within those limits before the vehicle or any part thereof has come on to the carriageway within those limits." In *Hughes* v. *Hall* [1960] 1 W.L.R. 733, the

Divisional Court has now held that the limits of the crossing are the studs bordering the striped crossing and not the studs indicating the approach to the crossing, and that a motorist who had passed over them when a pedestrian stepped on the striped portion was guilty of an offence. It was also observed that the regulation imposed an absolute duty and it was immaterial whether there was any negligence on the part of the motorist.

W. A. E.

3. PRIVY COUNCIL CASES

TRADE DISPUTE—Picketing.

Vere Cornwall Bird and Others v. *Joseph Reynold O'Neal and Another* ([1960] 3 W.L.R. 584) was an appeal from a judgment of the West Indian Court of Appeal dismissing an appeal from a judgment of the trial judge granting an injunction restraining the present appellants, their servants and agents, from watching and besetting the business places of the respondents, and ordering the appellants to pay £80 to the respondents as damages for conspiracy. The West Indian Court of Appeal increased the damages to £100. The appeal arose out of an action claiming damages and an injunction which the respondents brought against the appellants as a result of events which followed a resolution of the executive committee of the Antigua Trades and Labour Union authorising the general secretary to take the necessary steps to picket the business premises of the respondents.

The respondents had dismissed a clerk whom they employed on a weekly basis, paying her a week's wages, but giving no reason for the dismissal. An official of the Antigua Trades and Labour Union asked the respondents for the reason for the dismissal, and that request was refused. The union then made representations to the Commissioner of Antigua and under his chairmanship conciliation meetings were held. At the second meeting the representatives of the respondents gave the reasons for the dismissal which the union's representatives said proved nothing against the clerk and did not justify her dismissal. The voluntary negotiations broke down, and the union asked the Government to appoint a board of inquiry under section 8 (1) of the Trade Disputes (Arbitration and Inquiry) Act, 1939. At the inquiry the board held, contrary to the submission on behalf of the respondents, that a trade dispute existed and that the board had full power and authority to inquire into it. In its report the board expressed the opinion that there was no moral justification for the dismissal of the employee and, using as a norm one of the accepted principles of good industrial relations, that is, the principle of mutual respect and tolerance of human rights between employer and workman, recommended that the respondents be asked to pay the employee a sum equivalent to thirteen weeks' wages as a compensation for her dismissal. The respondents were informed that the Acting-Governor agreed generally with the report, but they did not take "such action with a view to the settlement of the dispute as may be deemed desirable." The Administrator caused the report to be published in the local Press; and the next day the respondents' premises were picketed pursuant to the resolution of the executive committee of the union referred to above. The appellants Joseph (No. 7), and Hurst, the general secretary (No. 9), engaged six pickets. The appellants numbered 1 to 7 and number 9 were all members of the executive committee. Samuel (No. 8) was not a member, but was described as the chief picket. Williams and Ireland (Nos. 4 and 6) were not present at the meeting of the committee when the resolution was passed. Hurst, in his evidence at the trial, stated that he gave the pickets instructions to conduct themselves in an orderly manner, and told them that their duty was to pass on information to members of the public with regard to the dispute and not to molest anyone.

The respondents' statement of claim set out the matters complained of, giving particulars, and concluded that, in the alternative, the appellants and each of them wrongfully and maliciously conspired with intent to injure the respondents to create a nuisance, and did in pursuance of their conspiracy create a nuisance by the continuous shouts and other noises of the pickets and by obstructing the approaches to the said business places of the respondents, thereby seriously interfering with the comfort of the respondents and their ordinary enjoyment of the premises. They claimed against the appellants and each of them damages; and an injunction against the appellants, their servants and agents from unlawfully watching and besetting the respondents' business places. The appellants denied the alleged conspiracy and put all the isolated acts of the pickets in issue. They denied that they were the employers of the pickets and that they had authorised or consented to or knew of any improper picketing. They alleged that a trade dispute existed between the union and the respondents, that the picketing was in furtherance of the dispute and that it was at all times lawful.

Their Lordships stated that there were concurrent findings of fact in the courts below which clearly established that intimidation and threats of violence were used to prevent customers from entering the business premises of the respondents to an extent which amounted to an actionable nuisance. How far responsibility for those acts of the pickets could be established against all or some of the appellants required further consideration. The trial judge approached that question as follows. He found that the appellants, other than Samuel, had by the resolution agreed to the picketing of the respondents' premises, that the general secretary had appointed the pickets pursuant to the authority which the resolution conferred on him, that the pickets so appointed had used coercion, intimidation and threats of personal violence and that the pickets so appointed were the servants of the appellants who were liable for the acts of their servants. He accordingly held that, although the predominating object of the picketing was the furthering by the appellants of their own interests, they had conspired to achieve their purpose by the use of unlawful means. Samuel, though he was not a member of the executive committee and had not attended any of its meetings, was held liable, as the judge held that it was not disputed that he had combined with the other appellants for the purpose of picketing the premises.

That reasoning could not be supported. The pickets were not the servants of the individual appellants. They were appointed by the union which could only act by agents who were, in this case, the executive committee and the general secretary, but that did not create the relation of master and servant between those persons and the pickets. The general manager or works foreman of an industrial limited liability company might have authority to engage and dismiss workmen and direct their operations, but that did not make the workmen whom they appointed their servants. The Court of Appeal endorsed the trial judge's findings with regard to the means and methods adopted in the picketing, but were not satisfied that he had made a definite finding that the main purpose of the conspiracy was to further the appellants' legitimate interests, and said that they were still less convinced that there was sufficient and satisfactory evidence to support such a conclusion. They said that the evidence revealed that the appellants' external acts and conduct showed that the appellants had a common purpose, that was, to cause injury to the respondents and bring them into subjection by employing means which were manifestly unlawful. The Court of Appeal did not seem to have examined the position of each individual appellant to determine whether, and, if so, how he had become a party to the unlawful conspiracy alleged. It appeared, therefore, that they must have approached the question in the same way as the trial judge, that was, on the basis of the existence of the relationship of master and servant between the individual members of the executive committee and the pickets.

In rejecting any conclusion adverse to the appellants based on the master and servant theory their Lordships were not to be understood as saying that a finding of unlawful conspiracy might not have been established against some of the appellants if the courts below had approached the case from a different angle, that was, by looking to see what part, if any, each appellant had played in connection with each specific incident when threats or intimidation had been used, and then considering whether such part necessarily compelled the inference that the particular appellant was party to a conspiracy to use unlawful means to further the object of the picketing and thereby create a nuisance. Their Lordships did not consider that it would be proper for them at this stage to undertake such an investigation in the absence of clear and convincing evidence implicating the persons concerned and pointing irresistibly to their participation in an unlawful conspiracy. The evidence accepted by both courts below did, however, reveal beyond doubt that the appellants Joseph (the organiser) and Samuel (the chief picket)—apart from any question of conspiracy—were present and actively assisting in the picketing which was being carried out with threats and intimidation so as to obstruct the approaches to the respondents' premises thereby constituting a nuisance which had been found to have caused damage to the respondents' trade. The statement of claim alleged in the alternative a conspiracy to create a nuisance and the creation thereof pursuant to such conspiracy. Their Lordships did not consider it necessary or desirable to investigate whether the participation of Joseph and Samuel in the creation of the nuisance was in pursuance of a previous conspiracy or not. It sufficed that they were each responsible for the tort in the commission of which they had assisted. They were accordingly liable for the damage which the trial judge had assessed at £80, and as against them the respondents were entitled to an injunction.

So far no reference had been made to the legislation referring to trade disputes. As the relevant legislation contained nothing to protect any individual from liability for torts committed by him whether or not in furtherance of a trade dispute, it was not strictly necessary to the decision of the appeal to determine certain questions of considerable importance to trade unions and employers, which figured prominently in the courts below. But their Lordships considered it desirable to make some observations thereon. By section 2 of the Trade Unions Act, 1939, " workmen " includes labourers. " Trade dispute " means any dispute or difference between employers and workmen . . . connected with the employment or non-employment, or the terms of employment, or with the conditions of labour, of any person." In considering that aspect of the case their Lordships stated that the trial judge had held that a trade dispute existed (contrary to the respondents' contentions), and that the predominant object of the picketing was a furthering by the appellants of their own interests, although they had other objects in mind, and unlawful means had been used.

The Court of Appeal held that the definition of workman did not include clerk, and that the judge was wrong in holding that a trade dispute existed between the respondents and the clerk, represented by the union. In their Lordships' opinion there was nothing to compel a limited and restricted meaning to the word " workman," but the subject-matter called for a wide and liberal interpretation which should not exclude any shop assistants. With regard to the judge's finding that the predominant object of the picketing was the furtherance of the appellants' own interests, their Lordships could not accept the view of the Court of Appeal that the finding was not justified by the evidence, and their Lordships also agreed with the trial judge's rejection of the submission that the lawful dismissal of a workman could not be the subject of a trade dispute.

(Dictum of Lord Wright in *R.* v. *National Arbitration Tribunal, ex p. Bolton Corporation* ([1943] A.C. 166 at p. 189) applied.)

The order of the Court of Appeal was discharged, and the judgment of the trial judge varied by entering judgment for the sum of £80 damages against Joseph and Samuel only, and granting an injunction against those two appellants, restraining them from creating a nuisance to the respondents by using threats or intimidation or inciting other persons to use threats or intimidation to deter customers from entering the respondents' premises or otherwise obstructing free access by the public thereto.

CHEQUES—Partnership Account—Fraud of one partner.

Commercial Banking Company of Sydney, Ltd. v. *Edward Rolf Mann* ([1960] 3 W.L.R. 726) was an appeal from the judgment of the Supreme Court of New South Wales in favour of the respondent, a solicitor, in an action in which he sought to recover from the appellants £3,505 on each of two counts: (1) that the appellants had received that sum to his use; (2) that they had converted thirteen documents, described as bank cheques, the property of the respondent. At all material times the respondent was practising his profession in partnership with Gordon Arthur Richardson under the firm name of E. R. Mann and Co. The appellants carried on the business of banking in the Commonwealth of Australia. At the Pitt and Hunter Street branch at Sydney of the Australia and New Zealand Bank, Ltd. (the A. N. Z. bank) the respondent and Richardson maintained a " trust account " in the name of the partnership. By the partnership agreement all the assets of the partnership, including all money to the credit of any bank account in the partnership name, were the property of the respondent, but Richardson was entitled to the income of the partnership save for small weekly drawings by the respondent. It was also a term of the partnership that either partner might draw cheques on its banking account, and that the respondent should give the necessary authority for that purpose. Such authority was given to the A. N. Z. bank.

In purported exercise of the authority mentioned Richardson drew thirteen cheques on the trust account. In each case after the printed word " Pay " in the printed form of the cheque was written "Bank cheque favour H. Ward," or "Bank cheque H. Ward." The printed words "or bearer" were not struck out. In each case an application on a printed form for a bank cheque in favour of H. Ward for an amount equal to the amount of the first-mentioned cheques was completed and signed "E. R. Mann and Co. per G. Richardson." Those documents were taken to the A. N. Z. bank, and in each case the bank debited the trust account of the partnership with the amount of the cheque at the same time issuing a bank cheque for an equal amount in the form "Pay H. Ward or bearer." It did not appear whether those cheques were handed to Richardson or Ward or some third person, but Ward took each one of them to the Maroubra branch of the appellants, where he had an account, and each was cashed over the counter. In due course each of the cheques was paid by the A. N. Z. bank to the appellants against delivery. From first to last the part which Richardson played was fraudulent. Ward was not a client of the partnership and no client had authorised the payment to him of any money held in the trust account. Richardson concealed his fraud by fictitious entries in the partnership books. The judge found for the respondent on each of the two counts in the sum of £3,305 and gave judgment accordingly. The Board stated that bank cheques were similar to "bank drafts" as known in the United Kingdom, and were commonly used by solicitors in settling conveyancing transactions and by other persons engaged in commercial transactions where it was inconvenient to use cash, but the creditor wished for some further assurance of payment other than the debtor's personal cheque. They were, in legal significance, promissory notes made and issued by the bank. The claim in conversion could be maintained only if the cheques were the property of the respondent. It was contended, first, that they became so from the moment they were issued and never ceased to be his property; and, secondly, that they became his property by his ratification of the acts of his partner Richardson. No other act of ratification was advanced than the issue of the writ in the action. Both contentions failed. The respondent could not as between himself and the A. N. Z. bank question Richardson's authority to draw cheques on the trust account. As between Mann and Richardson the position was different. Richardson had no authority, express or implied, from the respondent either to draw cheques on the trust account or to obtain bank cheques in exchange for them except for the proper purposes of the partnership. If he exceeded those purposes, his act was unauthorised and open to challenge by the respondent. It was in those circumstances that the question must be asked whether the bank cheques were throughout the property of the respondent. It was irrelevant to that question what was the relation between Richardson and Ward, and whether the latter gave any consideration for the bank cheques which he received, and at what stage the respondent learned of the fraud which had been practised on him. The proposition on which the respondent founded his claim was simple enough : Richardson was his partner and in that capacity was able to draw on the trust account and so to obtain the promissory notes; therefore the notes were the property of the partnership and belonged to the respondent, and Richardson could not give a better title to a third party than he himself had.

The Board then considered *Union Bank of Australia, Ltd.* v. *McClintock* ([1922] 1 A.C. 240) which, in its facts and the law applicable, bore a remarkable resemblance to the present case. In the present case the judge, having found that Richardson had obtained the bank cheques in question in fraud of the respondent and without his authority, should have gone on to hold that they did not become the respondent's property. In effect Richardson, by means of unauthorised cheques, misappropriated moneys in the trust account and used them to acquire bank cheques from the A. N. Z. bank which bound that bank to pay Ward or bearer out of its own money the amounts specified in the cheques. No case had been referred to in which property so acquired had been held to belong automatically to the party defrauded. The principle that the purchaser of a chattel took it, as a general rule, subject to what might turn out to be informalities of title, had no application to a case of misappropriation of funds by an agent and their subsequent application for his own purposes. Though a remedy, perhaps more than one, was available to the person defrauded, that was not to say that the property so acquired at once belonged to him so that he could sue in conversion a third party into whose hands it had come. Accordingly, the claim in conversion failed.

With regard to the alternative contention of ratification, it was nowhere specifically pleaded what acts of Richardson's the respondent ratified nor how he ratified them. It rested on the contention of counsel that the ratification was effected by the issue of the writ in the action, but even so it remained obscure what acts the issue of the writ was supposed to ratify. By the time the writ was issued the bank cheques had been issued to Richardson (or Ward), the appellant bank had bought them from Ward, and the issuing bank had duly honoured them on presentation. It was impossible for the respondent to pause at any point in that chain of events and claim to ratify the act of Richardson in obtaining the issue of bank cheques in favour of " H. Ward or bearer " without also ratifying the subsequent dealing with the cheques by him and the appellant bank. The respondent failed to prove a conversion by the appellant of cheques which he sought to make his own by ratification; for if he ratified at all, he ratified the dealings by Ward and the appellant with the cheques, and, if he did not ratify, nothing had been converted which ever belonged to him. (*McClintock's* case (*supra*) and *Bird* v. *Brown* ((1850) 4 Ex.R. 786) applied.) The appeal was accordingly allowed.

AGRICULTURAL LAND—Mortgage—Compulsory purchase order.

Land Commissioner v. *Vasara Pinto Jayewardene and Another* ([1960]) 3 W.L.R. 643) was an appeal against a judgment and order of the Supreme Court of Ceylon which, by a majority, affirmed a judgment and decree of the District Court of Colombo directing that an injunction should issue in favour of the plaintiffs restraining the Land Commissioner from acquiring certain lands under the Land Redemption Ordinance, 1942, of Ceylon (No. 61 of 1942), as amended by the Ordinance, No. 62 of 1947. Section 3 (1) provided " The Land Commissioner is hereby authorised to acquire on behalf of the Government the whole or any part of any agricultural land, if the Land Commissioner is satisfied that that land was, at any time before or after the date appointed under section 1, but not earlier than January 1, 1929, either . . . (*b*) transferred by its owner . . . to any other person . . . in satisfaction or part satisfaction of a debt which was due from that owner . . . to that other person and which was secured by a mortgage of that land subsisting immediately prior to the transfer. . . .” The principal issue raised by the appeal was one of the construction of the Ordinance.

One Suriyapperuma owned certain lands which, by bond dated January 30, 1932, he mortgaged to one Jayewardene as security for the repayment of a sum of money which had been lent to Suriyapperuma. Jayewardene put the mortgage bond in suit and obtained a mortgage decree dated July 18, 1934. By deed dated July 20, 1935, Suriyapperuma conveyed to Jayewardene some but not all of the lands which had been mortgaged. The conveyance was in satisfaction of the amount due on the mortgage decree. Possession of the lands conveyed was taken. Jayewardene died in August 1937 and his widow and child, the plaintiffs in the action brought later, acquired title to the lands conveyed as heirs of Jayewardene. In December 1950 the Land Commissioner made a determination to acquire two lands, being part of the lands conveyed by the deed of July 20, 1935, under section 3 (1) (*b*) of the Ordinance. The plaintiffs, by their plaint dated March 24, 1952, stated that the two lands did not fall within the description in section 3, and that they were not therefore subject to acquisition by the Land Commissioner under the Ordinance. They claimed an injunction restraining the Land Commissioner from the acquisition of the two lands.

In the Board’s opinion section 3 (1) (*b*) applied, and it mattered not that there was additional land covered by the mortgage which was not included in the transfer. (The lands were secured by a mortgage which was subsisting immediately before the transfer.) The Board could not agree with the view that section 3 (1) (*b*) only applied (where several lands were mortgaged) if all the mortgaged lands were transferred in satisfaction or part satisfaction of the debt. It was contended that, after a mortgage decree had been directed, the debt was not secured by a mortgage of the land, but that thereafter it was the decree of the court which secured the land. The Board could not accept that view, and they saw no reason to differ from the conclusion reached in *Perera* v. *Unantenna* ([1953] 54 N.L.R. 457). The appeal was accordingly allowed and the action dismissed.

4. REPORTS

(a) *Constitution of Security over Moveable Property*

It is part of the fascination of Scots Law that in its formative period it was so catholic a borrower from other systems—it is part of its tragedy that in the period of its subsequent development many original principles were distorted or abrogated by " adapted " legislation or were misunderstood by an appellate court which for long contained no leaven of Scottish jurists. But despite these special influences and the evolutionary changes which new social and economic conditions impose upon any system of living law, there are here and there original bastions which have stood unreduced. One such, in the field of security law, is the rule that a contractual security over moveables cannot effectively be constituted without delivery. The Eighth Report of the Law Reform Committee (Cmnd. 1017), if adopted, will not mean that the bastion has fallen, but infiltration around it will be permitted by incorporated companies only.

Briefly, the Committee recommends that incorporated companies should be permitted to create securities over their moveable property, without delivery, in the form of floating charges which may include both heritable and moveable property. A floating charge may (and normally will) affect all the assets of the company, both existing and future, but it does not crystallise, *i.e.*, become a fixed security, until the liquidation of the company.

The commercial utility of so flexible and convenient a form of security is evident, and indeed the various professional and commercial bodies who submitted memoranda to the Committee were unanimously in favour of the introduction of some such form of security over moveables. The most compelling reasons for the reform are that a very great proportion of the capital of modern business is represented by moveable assets such as plant and machinery, stock, work in progress and debtors, and that it is inequitable that Scottish industry should be denied the facility, available in England, of making these assets a fund of credit. Since many of these assets are constantly changing, some form of floating security was clearly indicated. The Committee recommend that it should be competent to create a floating charge over all the property, both heritable and moveable, of the borrower, thus making the facility most widely useful. It is also proposed that the instrument creating the charge may impose restraint upon the borrower granting any later fixed security having priority over the floating charge. Apart from any such restriction, however, the borrowing company may deal freely with the assets which are the subject of the charge.

Thus far the recommendations of the Committee correspond broadly with the English practice, but the Committee depart from English precedent in regard to the circumstances in which the charge will crystallise. In England a charge crystallises upon the appointment of a receiver or upon the liquidation of the borrowing company. The Committee do not recommend that the office of receiver be introduced to Scotland but suggest that the charge should crystallise only upon liquidation. It is proposed, however, that provision be made to enable the holder of the charge to petition the court for the winding up of the company in circumstances in which the court in England would appoint a receiver, *i.e.*, upon default in payment of principal or interest, or where the security is in jeopardy.

This particular recommendation was obviously one which caused the Committee some concern. On the one hand it was recognised that the appointment of a competent receiver had frequently saved companies from extinction and set them on the way to financial recovery. On the other hand it was evident that there would be practical difficulties either in introducing receivers or in adopting the Scottish equivalent of judicial factors. The former course would have necessitated codifying in statutory form the English law of receivers which is based on the practice of the Court of Chancery: the latter course would have involved fitting the provisions as to a new type of judicial factor into existing legislation, and those who have attempted the task of disentangling the powers of judicial factors from the existing jungle of statute law on the subject might well despair of driving a clear path through it for a new entrant. On this matter the Committee have preferred the practicable to the ideal, and no doubt wisely. The reform which they advocate is desirable immediately. The changes in law required to secure it have already been carefully considered by the Committee in the body of the Report and are outlined in some detail in Appendix II, and they are such as can be readily passed into law. Delay in the introduction of the

Committee's major recommendation would be too great a price to pay for the benefits of receivership.

An important practical aspect of the proposed reform is the provision to be made for adequate publication of the existence of the floating charge and of its crystallisation. The Committee recommend that a Register of Charges be kept by the Registrar of Companies in Edinburgh and that the provisions which at present apply to companies incorporated in England be applied to Scottish companies. It would be necessary for fixed securities and floating charges to be registered in the Register of Charges, and registration of a floating charge would constitute actual notice of it to all persons. Registration of a notice of liquidation in the Register of Companies in accordance with the existing statutory provisions would sufficiently publicise the fact that the floating charge had crystallised. The Committee examined the possibility of providing for registration in the Register of Sasines or the Register of Inhibitions and Adjudications, but, for reasons given, rejected that method of publication.

This part of the Report will no doubt occasion adverse comment from practitioners and legal theorists alike. It will now be necessary for a heritable security over the property of a limited company to be registered, not only in the Register of Sasines, but also in the Register of Charges, and an intending lender to such a company will require a search in the Register of Companies as well as the property and personal registers to ensure that there is no floating charge which in terms precludes the creation of a subsequent fixed security. Any additional procedural requirement is unwelcome, but the extra burden should not be exaggerated. Registration of a security over a company's property in the Register of Charges is a comparatively simple matter, and one to which English practitioners have long been accustomed. At present a prudent lender frequently satisfies himself as to the financial structure of the borrowing company by examination of the Register of Companies, and the new provisions will make essential only that which is already a wise precaution. The proposal that the charge crystallises and becomes a fixed heritable security upon liquidation offends against feudal theory which requires infeftment by registration in the Register of Sasines for the constitution of a heritable security, but in the special situation of bankruptcy and liquidation there are precedents for such a course, *e.g.*, the existing provisions of section 97 of the Bankruptcy Act, 1913, whereby the whole heritable property of the bankrupt vests in his trustee without any notice whatever appearing in the Register of Sasines.

All in all, this carefully thought-out document is a worthy addition to the list of Reports produced by the Committee. It traverses in some degree an important principle of Scottish security law, but it is the duty of a Law Reform Committee to recommend such a change when, as in this instance, it considers that a case for reform has been made out. It may be that the members of the Committee had misgivings lest their proposals should be construed as a further stage in the process of assimilation to English law and practice, which has not always been beneficial. But any disquiet that their recommendations would be regarded as merely *ad imitationem vicini* and out of harmony with our own traditions has been dispelled by the masterly little historical survey in Appendix I where Professor T. B. Smith, in a saltatory feat of agile scholarship which spans the centuries, shows that the reforms proposed would be entirely consistent with the civilian principles which we have inherited. With that comforting assurance available to the members of the Committee, no doubt, in the words of Bailie Nicol Jarvie, " A'body was alike pleased." It is hoped that Parliament will be also.

J. M. H.

(*b*) *Legal Aid in Criminal Proceedings*

Legal aid was introduced under the 1949 Act but from the beginning it was not a universal cover for all proceedings. Certain types of action were excluded and for the first ten years or so it was only available for civil proceedings in the sheriff court and the Court of Session. There also were financial limits for eligibility. In the last couple of years the scheme has been extended substantially. Under section 5 of the Act it is now possible to obtain legal aid in the steps preliminary to an action: under section 7 it is now possible to obtain legal aid for advice in which no action is contemplated. It is whispered that the scheme may be extended to appeals to the House of Lords. These extensions were made on the basis that the original scheme made up by the Law Society could be applied to the extensions with only minor variations.

When it came to considering extension to cover criminal proceedings it was immediately appreciated that the same scheme could probably not be applied: and indeed that the Act itself might require amendment. This is noted in the terms of reference to the Committee which presented its report in February 1960 (Cmnd. 1015). The Committee sat on twelve occasions and saw witnesses personally on six occasions and considered written memoranda. Unfortunately it was unable to persuade any " old lags " to attend or submit any views. But the length of time between the appointment of the Committee (December 19, 1957) and the presentation of its final report indicates the difficulty which was experienced in devising the scheme which is now submitted as a basis for extending legal aid to criminal proceedings.

In courts of first instance the Committee recommends that legal aid should be available in the lowest courts and in the highest courts. In the burgh courts and justice of the peace courts it should only be available on a legal aid certificate issued by the court—a procedure borrowed from English practice. In summary proceedings before the sheriff (and in juvenile courts under section 51 of the 1937 Act) legal aid should be available automatically where the offence charged is punishable with imprisonment without the option of a fine: in other cases on a legal aid certificate granted by the court. Under solemn procedure all persons are to be entitled to legal aid.

A legal aid certificate is applied for to the courts: citations may be accompanied by an appropriate notification: arrested persons will be informed of their rights: grant or refusal is in the absolute discretion of the court.

It is in the nature of criminal proceedings that in courts of first instance, the question of *probabilis* does not arise.

But the most important difference from civil legal aid—and the only point on which a dissent is raised—is on the financial side. (The Committee dismissed as impracticable an extension of the present Poor's Roll scheme with an increased payment by the Treasury.) Civil legal aid contemplates free legal aid below a certain level of resources; a financial contribution when the resources are up to a higher level; and no legal aid beyond that higher level. (The upper level was this year increased to a net disposable income of £700—a not inconsiderable sum.) The resources on the income side are estimated on the basis of the past twelve months' income on the assumption that this will continue for the next twelve months; the assessment is made by the National Assistance Board. The Committee found it impossible to contemplate applying this scheme to criminal proceedings. The very outcome of a criminal charge may in the large majority of cases nullify the assumption of a continuation of earnings for twelve months: the time involved in an assessment by the National Assistance Board is destructive of the principle of having legal representation at the earliest possible opportunity: and the idea of collecting contributions after the accused has been tried (or after he has paid a heavy fine or come out of prison) cannot be thought of.

Accordingly the Committee recommends that there be no financial contribution by persons given criminal legal aid; and that financial eligibility be determined by the sheriff or the lower court before whom the accused is prosecuted; on a written declaration of resources and a summary hearing where the prosecutor can attend: providing an "in or out" result. The decision is to be in the absolute discretion of the court, and it is here that the single dissent argues that precise criteria must be laid down for the guidance of the courts in considering financial eligibility: and that the scheme should contemplate a lump contribution from immediately available resources.

Where legal aid is to be available automatically, it is to be available up to the conclusion of the first diet (in summary proceedings) or full committal (in solemn proceedings) before financial eligibility is determined.

There are to be lists of solicitors and advocates willing to act on legal aid with full choice by the accused; and "public defensors" are contemplated in the lowest courts; and a public defensor or rota solicitor in the sheriff court up to the first diet.

In the case of appeals, both *probabilis causa* and reasonableness are to be considered by the Law Society; financial eligibility is to remain a matter for the court. In appeal by stated case, the amount of the consignation should be assessed by the sheriff having in view the resources of the accused: and the fee payable to the clerk of court should be remitted.

The Committee was unable to form an estimate of the likely cost of the scheme. In 1949 fears almost amounting to panic were expressed that the introduction of criminal legal aid would overwhelm the then already overcrowded courts. The Committee discounts these fears though looking to a slightly higher level of not guilty pleas.

The outstanding feature of the proposal (and the principal difference from the civil schemes) is the absence of financial contribution. This is a step towards the probable ultimate national legal aid service: recommended by the Muir Society to be absolutely free or alternatively to be insured for by still another National Insurance stamp!

The civil legal aid provisions exclude legal aid in certain forms of action—one wonders whether criminal legal aid when introduced will likewise exclude certain intimate forms of crime from the legal aid calendar.

Legal aid in criminal proceedings is already available in England. The government will no doubt facilitate its introduction in Scotland in the near future.

J. M.

(c) *Report of the Departmental Committee on Powers of Subpoena of Disciplinary Tribunals*

A particular case, late in 1959, in which evidence obtained by the police was disclosed to the Disciplinary Committee of the General Medical Council, created uneasiness which led to the appointment of this Departmental Committee under Lord Simonds.[1] Much of that uneasiness was due to confusion of thought. There was the initial confusion between "wire-tapping," properly so called, and eavesdropping invited and authorised by one party to a telephone conversation. That question, which generated much heat, was not put to the Simonds Committee, which was only asked to consider to what extent and subject to what conditions subpoenas or citations should be issuable to compel the attendance of witnesses and the production of documents before disciplinary tribunals, and in particular whether police officers should be compellable by such means to disclose evidence obtained in the course of criminal investigations.

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[1] See the debates, etc., in 614 H.C.Deb. cols. 1184 and 1388; 615 H.C.Deb. cols. 1523 *et seq.*

The Report (Cmnd. 1033) does much to clear the air. First it points out that such disciplinary bodies have, apart from statute, a right to apply to the Crown Office for a subpoena, and that, on the analogy of the practice of the Church Courts applying for citations in aid of their processes, a like right exists in Scotland. This right was easily ascertainable; the *White Book* made its existence clear, and it forms part of the background of the meaning of the judgment in *Addis* v. *Crocker* [1960] 2 All E.R. 629. Nevertheless, the General Medical Council doubted whether it had such a right at common law, or was ignorant of it, and for that reason pressed for a statutory power now contained in the Medical Act, 1956, s. 37 (5) and paragraph 5 (1) of the Fourth Schedule.[2] There are disadvantages in relying here upon non-statutory powers and the Committee thus recommend (§ 15) that express power to secure the issue of subpoenas or citations should be given to those statutory disciplinary bodies which at present lack it, and that any bodies created in the future should have that power.

The arguments for that conclusion are cogent. Without the power to compel evidence injustice may be done to an individual (and one possible instance of that was given). Equally harm may be done to the public. The Committee rightly emphasise (§ 32) that " Parliament has established disciplinary tribunals because infinite harm may be done if a person, being in a position of trust and confidence and having special responsibilities for the health and welfare of others, is to be free to continue in that position after showing himself by some variety of infamous conduct to be unworthy to be further trusted." That remark goes to the heart of the matter and removes, or ought to remove, the other confusion of thought which was noticeable. The General Medical Council, or the Law Society (either in England and Wales, or of Scotland) or other bodies of a like sort in exercising such powers is not acting as a private body. It is a public one, and on the Continent its character as such would be recognised. It is also exercising a duty of policing a profession in the interests of the public. Much of the indignation in the case in question arose from a confusion of such bodies with clubs and the like. Admittedly there is a gradual shading from one type to another and some bodies such as the Law Society may have both attributes. Yet the distinction between the two types of body is sufficiently clear, and it is possible that the recommendation is somewhat too narrowly drawn. The discipline of the Bar in neither jurisdiction is governed by statutory bodies, yet the disciplinary bodies exercise functions indistinguishable from those of the Law Societies. It is then arguable that if a statutory power is conferred it might be somewhat more broadly drawn, with a jurisdiction in the courts to refuse a subpoena or citation where the body concerned is not of that type. That jurisdiction already exists in relation to the common law power to issue subpoenas. There would thus be no innovation except that the command to attend or produce documents would be enforceable in both jurisdictions, which the command obtained under non-statutory powers is probably not.

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[2] These doubts were strengthened by casual remarks of Lord Simon and Lord Wright in *General Medical Council* v. *Spackman* [1943] A.C. 627, at 636 and 646.

This particular confusion appears to have operated not only in the minds of the public but also in those of some chief constables. On the second branch of their remit the Committee recommend that subpoenas or citations should be issuable to police officers. This recommendation was opposed by some chief constables in both England and Scotland, on the grounds that disclosure of information in a " non-criminal " cause would militate against co-operation by the public with the police and so impair the efficiency of the police. Rules compelling disclosure can have that effect. The American rule which requires the police to disclose their sources probably does, but in the present case since the police could be compelled to disclose no more to such tribunals than they would disclose to an ordinary court the difficulty does not arise. Even if it did, since proceedings before such bodies should be regarded as analogous and complementary to criminal proceedings, the difficulty should not be allowed to prevent the implementation of this recommendation. It should be pointed out, however, that the Report discloses (§ 25) that the police have in fact given evidence voluntarily or under formal compulsion under the Medical Act, and no unfortunate consequences of their so doing were indicated. In any event their evidence would still be subject to the ordinary rules of Crown privilege.

One suggestion of the Law Officers was rejected. It was that the issue of the subpoena or citation should be discretionary. Again the reasons for rejection are very strong. Such a discretion could only be exercised after what might amount to a preliminary hearing: without that the weight and significance of the evidence in question could not properly be determined. Such proceedings might become relatively frequent since their outcome could well determine the outcome of the real battle. The present situation which permits a motion to set aside the subpoena meets the case of frivolous or vexatious applications without that risk. Reasonably the Committee add the rider that, if tribunals are to have this power compelling attendance of witnesses who may raise intricate questions of Crown privilege and the like, then they should have available the services of a legal assessor. That rider has value quite apart from the present context.

The Report is a valuable one, which should do much to remove misunderstandings about the problems involved in the Committee's terms of reference. A reading of the Appendices suggests that some standardisation of procedures is generally desirable in this field; that might come about as a result of a clear recognition of the true character of these bodies, and in pointing to such a recognition the Report is of equal value.

J. D. B. M.

(d) *Report of the Scottish Advisory Council on the Treatment of Offenders, on Custodial Sentences for Young Offenders*

This is the second Report of the reconstituted Scottish Advisory Council on the Treatment of Offenders and was prepared by a Committee of that Council on the very narrow reference "to examine the law relating to custodial sentences for offenders between seventeen and twenty-one taking into account the Prison Commissioners' proposals on this matter in England and Wales." The limited nature of the terms of reference is probably responsible for a disappointing Report in which no novel or revolutionary proposals are contained. The Report might have been improved if the Committee had taken evidence from a greater and more representative number of witnesses and had been more familiar with studies which have been carried out on subjects concerned with its terms of reference.

The principal recommendation in the Report is that an additional form of custodial sentence for young offenders should be introduced. Reading the Report the impression is left that this recommendation is not put forward on its own merits but emerged indirectly because the Committee came to the conclusion that there was a need to effect improvements in some of the subsidiary arrangements which are made for young offenders sentenced to Borstal training and detention centres. First, the Committee referred to the present very undesirable practice (which, however, is reported as being purely temporary) of recalling to a Borstal section in a prison, for a period of not more than a year, a young person who has been released from Borstal on licence, the conditions of which he had failed to observe. "Even if they are housed in a separate Borstal institution or in a separate part of an institution, the comparative short period of their stay, and the fact that they have already undergone the normal type of Borstal training, make it almost inevitable that the recall period should amount to little more than a period of punitive detention, the consequence of not complying with the conditions of licence. We imagine that the power to recall is not infrequently exercised solely for the deterrent effect on other released inmates who may be inclined to treat too lightly the conditions of licence or the instructions of the after-care officers." (Paragraph 57 of the Report.) Since the Committee was of the opinion that the recall was a purely punitive measure it recommended that the standard period of recall should be restricted to one of three months and that it should be served in the proposed new custodial centre. Secondly, the Committee was critical of the absence of any after-care provisions for persons released from detention centres. The Committee recommended that there should be a maximum period of six months' supervision after the date of release from the centre. This involved the question of where a young man on supervision from a detention centre should go if recalled for misconduct during the period of supervision. In paragraph 49 of the Report the Committee discussed alternatives and came to the conclusion that he should serve the short period of recall in the proposed new custodial centre. Thirdly, the Committee was of opinion that the existing power conferred on the courts to order a young offender to be detained in a detention centre in default of payment of a fine should be abolished. The operation of this provision resulted in the presence of youths in a detention centre for varying periods, sometimes for no more than a few days, which disrupted the training programme in the centre.

Having presupposed, on these three grounds, the establishment of a custodial centre, the Committee proceeded to make its principal recommendation, that the courts should be empowered to impose a custodial sentence on young offenders for whom it was considered that detention in a centre or Borstal training was inappropriate. Such a sentence, which would be followed by a period of licence, would be served in a custodial centre, the establishment of which would be an essential requirement in giving effect to this principal recommendation.

Although the subsidiary reasons put forward by the Committee in support of the recommendation for the establishment of a custodial centre are unexceptionable and every proposal is welcomed which introduces any new forms of treatment for offenders, especially young ones, having the effect of individualising sentences and providing an increased opportunity for the punishment imposed to correct the delinquent's character or other deficiencies, the Committee has not given an adequate explanation in its Report of the precise treatment the inmates of a custodial centre will receive. The Committee stated that it expected that " in a custodial institution for young offenders a determined effort would be made to introduce an invigorating and positive régime which would embrace some of the features of detention centre training and of the training given to young persons serving a Borstal sentence." (Paragraph 67 of the Report.) There is no forecast of the probable effects of custody in such a centre or precisely which offenders the courts should send there. The Report does not disclose that the Committee subjected the existing methods of custody for young offenders—Borstal institutions and detention centres—to a sufficiently penetrating and critical appraisal. A number of recommendations for alterations in procedural matters for the improvement of both forms of custody is made by the Committee but the effectiveness of the treatment provided by the two types of institutions has not been evaluated. Known statistics with regard to relapse into crime by young persons who have undergone Borstal training disclose a " success " rate but there is still room for improvement.

The first detention centre opened in Scotland has been established for far too short a time to enable any conclusions to be drawn but a follow-up study undertaken by Dr. M. Grünhut, Reader in Criminology at Oxford University, of young offenders sent to a detention centre in England indicates a very limited degree of success. As a result of his study Dr. Grünhut recommended—as does the Committee in its Report—that a sentence of detention in a centre should be only for one period of time, namely, three months, and that it should be followed by aftercare.

Having regard to the not very successful experience of detention centres which Dr. Grünhut's study reveals, one wonders whether it may not be desirable to concentrate on forms of custodial treatment other than detention centres. The results achieved by the new centre in Scotland will determine this, but it must be remembered that, apart from the difficulties involved in providing buildings and equipment, the problem of obtaining suitable trained or trainable staff for such centres—be they custodial or detention—is the principal objection to attempting to establish too quickly (and without detailed knowledge of the purposes to be served and the possible results to be expected) too many centres intended to perform different functions. The success of every correctional institution is after all only a reflection of the adequacy and ability of its staff.

A second principal recommendation made by the Committee is that justice of the peace and burgh (police) courts should not have power to impose on a young offender any custodial sentence. This proposal could not do otherwise than improve the administration of criminal justice and might result in fewer irreconcilable disparities in the sentences imposed by criminal courts. There is no assessment, however, of the possible additional burden of work which would be thrown on to the sheriff courts if the recommendation was adopted, and whether the burden could, in practice, be borne. The restriction imposed by the terms of reference may have prevented the Committee from considering, as an alternative recommendation, the appointment of stipendiary magistrates in the more densely populated burghs.

Section 50 of the Criminal Justice (Scotland) Act, 1949 (which was repealed and replaced in identical terms by section 31 of the Prisons (Scotland) Act, 1952), empowered the Secretary of State to provide remand centres to which persons between fourteen and twenty-one years of age could be remanded or committed in custody for trial or sentence. In such remand centres facilities would be provided for the observation and examination of any person detained therein on whose physical or mental condition a medical report might be desirable for the assistance of a court in determining the most suitable way of dealing with such person. In the ten years since the coming into force of that provision no remand centre has been established and the Committee includes in its Report an earnest plea for the early establishment of remand centres. This is very properly featured as the first in the summary of the Committee's recommendations, and it is stressed that the centres must be provided with qualified staffs to enable courts to have the fullest information about individual young offenders in difficult cases before a decision is made with regard to sentence.

J. V. M. S.

CURRENT PERIODICAL LITERATURE

By K. W. B. Middleton, B.A., LL.B., Advocate, Sheriff-Substitute of the Lothians and Peebles

THE OMBUDSMAN

The Committee on Ministers' Powers (the Donoughmore Committee) was set up in 1929 to consider, *inter alia*, the judicial and quasi-judicial powers of Ministers, and it was asked to report on the safeguards "necessary to secure the constitutional principles of the sovereignty of Parliament and the supremacy of the Law." Accordingly, it directed its attention to the questions, whether ministerial tribunals were in themselves desirable or not, whether the courts of law ought to exercise control over them, and what measures were needed to give private persons appearing before them an equivalent protection to that given to litigants in the courts. While it rejected a proposal for a system of administrative courts in this country, the Committee was obliged to admit that Continental critics had justification for arguing that under the rule of law the remedy of subjects against the Executive was less complete than the remedy of a subject against a subject. This lacuna, it thought, might be, and could only be, filled by the Crown Proceedings Bill which had been drafted in 1927.

That lacuna was in part filled by the Crown Proceedings Act of 1947. But it became apparent that merely to amend the rules of procedure and substantive law that hampered subjects in establishing their legal rights against government departments did not go far enough. Some notorious cases, and particularly the Crichel Down case, showed that private persons might have serious grievances against government departments without any infringement of their legal rights. The Crichel Down case was largely responsible for the appointment of the Franks Committee on Administrative Tribunals and Enquiries in 1955. It lay, however, outside the Committee's terms of reference to consider issues of the kind disclosed by Crichel Down. In its report the Committee remarked significantly that it might well be thought that the individual has less protection against unfair or wrong decisions in cases where no formal procedure is provided for objecting or deciding on objections than in the much less numerous cases where formal procedures are provided. The discretionary powers of officials are more or less restricted in the latter class. In the former they are, within limits, unrestricted. Thus, even if every proposal for improving, from the individual's point of view, the formal procedures with which the Committee was concerned were put into effect, there would still be no redress against improper decisions within the ambit of the discretionary powers of the Executive. Unfortunately, abuses of this nature, that is to say, to give them a general name, maladministration, are difficult to guard against. The machinery of administration is so vast and complicated that abuses are bound to occur, and neither internal disciplinary measures nor ultimate parliamentary control can be relied on to reveal or to cure them.

If it is conceded that maladministration can only be adequately dealt with by some means of external supervision and control, closer and more efficacious than Parliament can offer, there seem to be two methods available. In the first place, a system of administrative courts may be set up, and a private person aggrieved by the act of a public authority may be granted a remedy in these courts not only when his legal rights have been invaded, in the sense that the act is tortious, or in breach of contract, or *ultra vires*, but also where the act, though *ex facie* lawful, is unreasonable or improper according to standards of administrative propriety evolved by the courts themselves. The classical example of such a court is the French *Conseil d'Etat*, which is prepared to quash administrative decisions of which it disapproves on a variety of grounds even if they appear to be *intra vires*, on the ground, for example, that they have an insufficient basis in fact, or are taken from improper motives, or offend against general principles to which, in the opinion of the *Conseil d'Etat*, they ought to conform.[1] It is clear that powers of this kind could only be exercised by a court that can probe the secret recesses of government departments and has the expert administrative knowledge to speak to officials in their own language and the prestige to impose its own standards on them. The *Conseil d'Etat* appears to perform these delicate functions admirably, but it is doubtful whether any other country has been able to follow the French model with entire success. There would certainly be difficulty in establishing a similar court in this country, where the Continental separation of public law from private law has never been accepted, and where lawyers and civil servants are apt to look at each other in not too friendly a manner across an almost impassable gulf.

The second method of protecting individual citizens against maladministration otherwise than by appeal to Parliament or to public opinion, is the appointment of an independent official of high standing, responsible to Parliament, whose duty it is to act as guardian of their interests and to investigate and report on any case where abuse of power by a public authority is alleged. This method has been adopted by the Scandinavian countries, being originally invented in Sweden.

Under the Swedish Constitution of 1809, political power was divided between the Crown and the legislature, and each was provided with means of maintaining its position against the other. Apart from more familiar weapons, the legislature was given the power of electing an official called the *Justitieombudsman* (usually referred to as the JO), with the object of supervising the activities of public officials, preventing abuses by them, and in particular upholding the independence of the judiciary from the Crown.[2] The Constitution of 1809 is still in force, in spite of the advent of democracy, and with it the office of JO, which, although its functions have somewhat changed, has become a well-established and respected institution. The JO sees to it that the law is observed by officials, including judges and Ministers as well as civil servants, and he investigates charges of illegality, negligence and breach of trust in the performance of official duties. He may institute proceedings against defaulting officials in the criminal courts, or in the case of Ministers and Supreme Court judges, before the Court of Impeachment. Prosecution is, however, a last resort, only some ten cases a year being brought before the courts. Generally the erring official is reproved, or obliged to correct a wrong decision. The JO, who is elected by the legislature for four years, reports to it annually, calling attention to shortcomings he has found of administrative bodies and courts, and recommending such changes of the law as he thinks are required. Any citizen is entitled to make a complaint to him, and he also carries out periodical tours of inspection, in the course of which he conducts investigations of the work of public authorities up and down the country. He has the right to examine any document, question any person, and demand all the assistance needed to perform his duties. It appears that the great majority of the complaints received are against (1) government departments and (2) the police, public prosecutors and the courts. The next largest category is against the authorities responsible for prisons, mental institutions and other places of detention. Naturally enough, most of the complaints received have little or no substance, and only in the case of a minority is fault disclosed.

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[1] See C. J. Hamson, *Executive Discretion and Judicial Control*.

[2] See B. Chapman, *The Profession of Government*, Chap. 12.

Finland and, more recently, Denmark have also their Ombudsman. The Danish one is of particular interest, because conditions in that country have a good deal of resemblance to those here, there being no system of administrative courts in Denmark, such as exist in almost every Continental country, including Sweden. An authoritative article on the Danish Ombudsman, or Parliamentary Commissioner, contributed by the first holder of the office, Professor Stefan Hurwitz, appeared in *Public Law*[3] not long ago. His duties are similar to those of the Swedish JO, but with some differences which call for remark. Thus in order to safeguard the independence of the courts, judges are outside the Commissioner's jurisdiction. Again, he is directed to investigate not only cases of negligence, error and illegality, but also "arbitrary or unreasonable" decisions of Ministers, civil servants and all other persons, except judges, acting in the service of the state, whereas the Swedish Ombudsman has no right to express his opinion as to whether or not an administrative decision taken by an official in the exercise of his discretionary powers is appropriate or reasonable.

Usually the investigations of the Danish Ombudsman are set in motion on receipt of a complaint, which may be lodged by any person without having to show a special interest in the matter concerned. But he may also take action on his own initiative within the sphere of his jurisdiction. He has the right to inspect any government office and to call for all records, documents and other information he deems necessary. The Ombudsman is elected by Parliament after every general election, and may be dismissed from office by Parliamentary vote at any time. He must not be a Member of Parliament, of which he is declared to be independent in the performance of his duties, must be legally qualified, and must not hold any office either in the public service or in a private firm or institution without Parliamentary consent. He is obliged to inform Parliament and the appropriate Minister of any case of negligence or error of major importance disclosed by his investigations, and to submit an annual report to Parliament. In the report, which is published, he records his decisions on individual cases which may be of general interest. While the Ombudsman has power to instruct the prosecution of offenders, or, in the case of civil servants, disciplinary proceedings against them, Professor Hurwitz makes it clear that these powers have not needed to be used. In practice it has been found sufficient for him to state his opinion on a complaint to the person complained of, or to negotiate with the authority concerned for the correction of a particular decision, or, where that is not possible, to require the taking of measures to prevent similar errors occurring in the future. He has, however, no right to alter an administrative decision. He can only recommend, and, if his recommendation is not accepted, which rarely happens, report the matter to Parliament.

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[3] (1958), p. 236.

A subsequent article in *Public Law*,[4] by a civil servant in the Danish Ministry of Justice, describes the working of this new institution since Professor Hurwitz's appointment in 1955. Some fears were expressed when the idea was proposed that supervision of officials by the Ombudsman would tend to deter them from taking responsibility without being protected by written rules. It is generally agreed that these fears have proved unfounded, and it seems that the office of Ombudsman is becoming as firmly established in Denmark as it already is in Sweden and Finland. It may be noted that quite a number of the cases reported by the Parliamentary Commissioner deal with complaints by civil servants against their superiors and against the conduct of disciplinary investigations involving them.

The author of the article referred to points out that many of the errors criticised by the Ombudsman arise from matters that would never have been brought before an ordinary court of law, or even an administrative court. For example, if it found that an administrative body had spent an unreasonable time in deciding a case brought before it, or that requests for information had not been answered, a court could do nothing, except make an incidental comment. Individuals with a grievance of this kind, which has been known to occur in countries nearer home than Denmark, will not bring an action merely in the hope that the government department or other authority concerned will incur judicial criticism. He will nurse his grievance in silence, or else write to the Press or his Member of Parliament, a course which may or may not bring him any satisfaction. A rebuke by the Ombudsman will be taken seriously, both because of his prestige and because of the thorough investigation which he will make before criticising an official or authority complained of. Procedural changes have in fact been made as a result of opinions expressed by him, and these opinions have not merely been negative but have included, for instance, specific recommendations of methods by which the average time spent in disposing of a particular type of case may be lessened.

Although no serious cases of official misconduct have been brought to the notice of the Ombudsman, he has had occasion to consider questions which have excited much public interest. Thus a dispute having arisen about working conditions in the School of Agriculture at Copenhagen, which led to extensive discussion in the Press, the Parliamentary Commissioner intervened on his own initiative and made a detailed investigation, the publication of which put an end to the controversy. On the other hand, many of the complaints taken up by him involve matters of no importance except to the individuals immediately concerned. He does not disdain to inquire into questions of rather a petty nature. A schoolmistress, for example, complained to him about the failure of some drivers of state-owned buses to enforce a non-smoking prohibition. The intervention of the Ombudsman resulted in a promise by the management of the state railways to enforce the rules in future, and also in an apology to the schoolmistress by one of the drivers who had been rude to her when she complained. It is entirely a matter for the Ombudsman to decide whether a complaint by a member of the public should be investigated by him or not. About 50 per cent. of those that are received are considered worth following up, and of the latter about 10 per cent. prove to be such as to justify criticism of the authority concerned or a recommendation of one kind or another.

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[4] (1959), p. 115.

The remaining Scandinavian country, Norway, is also about to appoint an Ombudsman, as appears from an article by the Chief Justice of the Norwegian Supreme Court in the *Journal of the International Commission of Jurists.*[5] A committee, which was set up by the Government to report on the safeguards required when administrative authorities make decisions affecting the rights and interests of individual citizens, put forward a number of proposals for legislation, of which one of the principal ones was the appointment of a Commissioner for the Civil Administration. The proposal follows the lines of the Danish Parliamentary Commissioner. There are two main differences. In the first place, the Norwegian Commissioner will not have a general responsibility for supervising the work of public authorities, but as a rule will deal only with individual cases, either on his own initiative or in consequence of a complaint addressed to him. Secondly, he will not have the power given to the Danish Ombudsman of ordering criminal or disciplinary proceedings to be instituted against erring officials. His powers will be purely advisory, except that he may demand access to all available information and documents.

The Scandinavian Ombudsman has attracted considerable attention in this country, even in non-legal circles, and the applicability of the office to British conditions is at present the subject of study by a group of "Justice," the British section of the International Commission of Jurists, under the chairmanship of Lord Shawcross. The same question is also treated in two contributions to *Public Law*, by Professor F. H. Lawson[6] and by Mr. L. J. Blom-Cooper.[7] Professor Lawson suggests the appointment of an Inspector-General of Administration, with the same tenure and relation to Parliament as the Comptroller and Auditor-General, charged with the duty of investigating complaints of maladministration and having the right to take legal action at his discretion, or to report to a Committee of the House of Commons. He would be empowered to take proceedings to have an illegal act quashed or, in the case of a criminal offence, to prosecute the offender, and also to lend his aid to any person entitled in his opinion to bring an action of damages. Where a public authority had acted harshly or improperly, but not illegally, and the Inspector-General could not obtain redress for the complainant, he would report the matter immediately to the House of Commons Committee, and so ensure at least publicity.

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[5] (1959–1960), p. 21.

[6] (1957), p. 92.

[7] (1960), p. 145.

The obvious difficulty about this suggestion is that an institution which works satisfactorily in a small country like Denmark might not be suited to one with a population ten or more times as great. The effectiveness of the office of Ombudsman depends essentially on his personal prestige and could hardly survive if he were nothing more than the head of a government department. In Denmark his staff consists (or consisted at the date of Professor Hurwitz's article) of ten persons, half of them legally qualified. The Norwegian committee of inquiry insisted that he must be able to deal with all complaints personally. One way out of the difficulty would be to limit the field of his activity by confining it to the more serious cases of illegal maladministration. But, as Mr. Blom-Cooper argues, it is imperative that a citizen with a grievance against officialdom should feel that an independent person has examined his case. Besides, a complaint which on first impression appeared a minor one might well turn out to be much more important on investigation. Mr. Blom-Cooper's solution is to divide the work between a Councillor appointed by Parliament and the judiciary. Any complaint or grievance by a citizen would be submitted in the first place to the Parliamentary Councillor's office, where the case would be examined. If investigation was required, it would be handed over to a High Court judge, who would call for and examine the public documents and hear explanations from the relevant government department. He would report his findings to the Parliamentary Councillor, who would then consider what recommendations, if any, should be put before Parliament. Both the public authority and the complainant would be advised of the contents of a report before it was published, and, where an adverse ruling against the authority was made, opportunity would be given to rescind any decision so as to remedy the grievance.

Mr. Blom-Cooper's suggestion would seem to deprive the institution of Ombudsman of most of its *raison d'être*. The process of investigation is an inseparable part, and indeed the central portion, of the Ombudsman's function. The investigation is informal. He has power to summon witnesses before a court of law, but the power is not used. Professor Hurwitz's method, as described by him, where he decides to follow up a case, is to have personal interviews after obtaining the necessary documentation with the complainant, the responsible officials, and perhaps other persons who can throw a light on the subject. As a result of these discussions he forms his views as to the materiality of the complaint and the redress, if any, due to the complainant. In this way he is in a much better position to come to a sound conclusion than if he were obliged to rely on findings made by an outside investigator after a more or less formal inquiry. Moreover, a member of the judiciary would not be at all well qualified to carry out this kind of inquiry, which demands expert administrative knowledge and a trained staff, so that he can deal with departmental officials on level terms. As Professor Lawson says, the most valuable work which his proposed Inspector-General might perform would be "to persuade the departments to get rid of certain unfortunate habits and to raise their standards of fairness and consideration to the public." It is only by close contact with officials and the ability to look at problems from their point of view that he could achieve this.

Professor Lawson claims that his suggestion would go further than any other plan to solve the problem of secrecy in administration, for there could be no reasonable objection to disclosure of official secrets to a person of the status and independence he envisages. No doubt the need for secrecy, whether real or alleged, in the public interest is one of the main obstacles in the way of a person with a grievance against the administration. A decision that is complained of cannot properly be either justified or condemned without full knowledge of the facts, and this may involve a disclosure of official records and files which administrators are naturally unwilling to make to anybody who asks them. They would be much more willing to do so if someone like the Scandinavian Ombudsman existed in this country. An *ad hoc* inquiry by a tribunal set up by the Government or a Commissioner appointed by a Minister is not really an adequate substitute. Such a method of investigating cases of maladministration is open to a number of objections, and compares badly in nearly every respect with an informal and confidential inquiry conducted by an expert in administrative practice whose function it is to discover and examine such cases.

As has already been explained, the supervision exercised by the Ombudsman has some advantages over control by an administrative court. On the other hand, the weak point in the institution is that he can only criticise and recommend. He cannot overrule an administrative decision which he finds to be unfair or unreasonable. The administrative authority may and does, though perhaps not often, refuse to comply with his opinion. In that event he can do no more than report to Parliament, and, because of the domination of Parliament by the Government, which is always inclined, especially on account of the dogma of Ministerial responsibility, to support the official view, an appeal to Parliament may not be an effective remedy for the grievances of the individual citizen. There would seem therefore to be room, assuming the unlikelihood of a general administrative court of appeal in this country, and if we were to adopt the Scandinavian idea, for setting up a special court with the limited purpose of deciding between the Parliamentary Commissioner, or Inspector-General, or Parliamentary Councillor, or whatever other name he was given, and the administration in cases where a recommendation by the former was rejected. The court might be composed partly of lawyers and partly of ex-civil servants or other persons of political and administrative experience, and its jurisdiction would be restricted to cases in which the exercise of a discretionary power by the administration was the subject of complaint, so that it would not trespass on the territory of courts of law nor of existing tribunals which decide disputes between the administration and private persons. It would also be undesirable that it should act as a court of appeal from decisions of the Parliamentary Commissioner. His right to investigate or not any complaint, or to dismiss it after investigation, and to make any suggestion or criticism he thought fit should not be fettered. The court should have power merely to uphold, vary or quash an administrative decision where a recommendation by him had not been accepted by the authority concerned.

It would be essential to preserve the status of the Parliamentary Commissioner and his complete independence in making investigations and giving advice. The Norwegian Committee of Inquiry was for these reasons averse to the Swedish and Danish practice of giving the Ombudsman power to order criminal proceedings against officials found by him to have committed an offence. Criminal prosecutions ought to be left to the proper authorities charged with that duty, and it would be enough for the Parliamentary Commissioner to bring to their notice any apparent infraction of the criminal law disclosed by his inquiries, or, in case of a disciplinary offence, to inform the appropriate authority. In any event, Professor Hurwitz shows that the power of initiating criminal or disciplinary proceedings is not one of importance. In the same way, it would appear to be open to objection for the Parliamentary Commissioner to be given power to take proceedings to have an illegal act quashed, as Professor Lawson suggests.

There are probably other reasons for rejecting the latter suggestion. The original function of the Ombudsman was to protect the rights of subjects against the Crown and its servants. Though he has lost his significance as an organ of constitutional control, he is still primarily a guardian of legality in the Scandinavian countries. But with us questions of legality are for the courts, and it is for private persons whose legal rights are infringed to bring the matter before the courts. The need for an official similar to the Ombudsman is confined to that large and twilit tract that stretches outside the jurisdiction of the courts. It would appear that in Denmark, for example, people frequently apply to the Ombudsman in preference to seeking a legal remedy available to them, because it is easier and cheaper to take that course. Again, the Ombudsman does not hesitate to express his opinion that an administrative authority has acted illegally or that a statutory instrument is *ultra vires*. These are not examples to follow. The sphere of action of a Parliamentary Commissioner in this country should be sharply defined so that he does not encroach on the sphere of the courts. He should not be concerned with questions of legality on the one hand, nor of policy, which is a matter for Parliament, on the other hand. His function would be to protect the interests of citizens in the territory that lies between law and politics, and therefore to ensure (a) that where a Minister or a public official or body has the discretionary power to make a decision, the discretion should be properly and reasonably exercised; (b) that official acts shall be performed in a proper and reasonable manner, in particular with due concern for the interest of private persons affected by them. It can scarcely be denied that this would be a valuable function, in view of the wide discretion necessarily given nowadays to the executive and in general to officials, and the immense variety of acts performed by them. If it has proved beneficial in the small countries of Scandinavia, it is surely required even more in a large country where the central government is more remote from the citizen, and the pressure on Parliamentary time and attention is so great that individual, as opposed to mass, grievances make themselves heard only with difficulty.

As for the problem, whether in a large country a Parliamentary Commissioner, with duties analogous to those of the Scandinavian Ombudsman, could deal with the multitude of complaints that might be submitted to him in such a way as not to lose all personal contact with the cases, the difficulty is perhaps not insurmountable. Complaints have increased in number steadily in Denmark since the office of Ombudsman was instituted, and for the latest year given by Professor Hurwitz numbered more than 1,000, of which about 50 per cent. required investigation. It is possible that, with a more strictly defined jurisdiction, the number of complaints investigated would not correspond to the difference in size of population. In any event, they would probably be more numerous than a single Parliamentary Commissioner could cope with unless his staff were increased to an unwieldy extent. But why should there not be more than one Commissioner, or at least why should he not have several deputies with co-ordinate powers?

If it were practicable, it would still be undesirable for one Commissioner to have jurisdiction over the whole of Great Britain. Even assuming that, as in Scandinavia, local government authorities were excluded from his supervision, he could still be concerned largely, and indeed predominantly, with local officials of the central government, police forces, hospital boards and so on. Moreover, in order to carry out his duties effectively he would need to be adequately acquainted with local circumstances, which are not uniform everywhere, and to be readily accessible to complaints. A remote official sitting in London would hardly have much attraction for an individual with some parochial, and yet to him important, grievance in Cumberland or Cardiganshire. Still more evidently, it would be necessary to have a separate Commissioner for Scotland, in view of the legal and administrative differences from England and Wales, and the fact that the departments of the central government with which he would mostly have dealings are situated in Edinburgh. There might be thought to be stronger reasons for introducing this institution in Scotland than elsewhere in Britian, owing to the limited consideration which Parliament can devote to specifically Scottish affairs. Is there not perhaps something to be said for appointing a Parliamentary Commissioner in the first place in Scotland, where the population is comparable to those of the Scandinavian countries? Scottish experience might show how the institution, if it worked with success, could be extended to cover the remainder of the United Kingdom most conveniently.

SUMMARIES

By S. G. Kermack, C.B.E., M.A., LL.B., Advocate, Sheriff-Substitute of Renfrew and Argyll at Oban

American Law

Modern Law Review, July 1960: "United States Supreme Court and Desegregation," by Paul Hartman of the U.S. Supreme Court Bar.

Oklahoma Law Review, May 1960: "Statutes of Limitation and Title Examination," by Lewis G. Mosburg, Jr., University of Oklahoma; "Monopolistic Price Behaviour," by Professor Dow, University of Oklahoma.

New York University Law Review, June 1960: "Federal Motor Carrier Licensing," by John H. O'Brien, Interstate Commerce Commission.

Connecticut Bar Journal, March 1960: "Survivorship Deeds under the Connecticut Public Act (1959), No. 677," by Professor Edward L. Stephenson, Connecticut University. In the June number of the Journal, "Statutory Changes of 1959: The *Corpus Delicti* Rule in Connecticut," by William S. Rogers, Assistant Editor.

American Bar Association Journal, September 1960: "The Background of Diversity Jurisdiction," by Judge Orie L. Phillips, U.S. Court of Appeals, and Judge A. Sherman Christenson, U.S. District Court, Utah.

Western Political Quarterly, June 1960: "Supreme Court Behaviour and Civil Rights," by S. Sidney Ulmer, Michigan State University.

COMMONWEALTH LAW

British Tax Review, May—June 1960: "Australia: The Tax Code of a Developing Economy (II)," by Alan G. Davies.

Public Law, Autumn 1960: "Public Employment—An Australian Contrast," by Leo Blair, University of Durham.

Canadian Bar Review, September 1960: "The British Columbia Trade Unions Act, 1959," by A. W. R. Carrothers, University of British Columbia; "Tort Liability for Strikes in Canada," by H. W. Arthurs, Toronto.

Canadian Bar Journal, August 1960: "Delay Rental Payments under Petroleum Leases," by M. Arthur Mears, Calgary; "Air Carriers' Liability," by W. T. Patterson, Q.C., and E. B. Macdonald, Winnipeg.

Journal of the International Commission of Jurists, Winter 1959, Spring—Summer 1960: "The New Constitution of Nigeria," by T. O. Elias, Barrister and Solicitor of the Supreme Court of Nigeria; "Report of the Kerala Inquiry," by the Indian Commission of Jurists.

Law Quarterly Review, October 1960: "Strict Responsibility in the High Court of Australia," by Colin Howard.

CONFLICT OF LAWS

New York University Law Review, June 1960: "Conditional Sales and Choice of Law," by Professor D. F. Cavers, Harvard.

CRIMINOLOGY

British Journal of Criminology (formerly *British Journal of Delinquency*), July 1960: "State of Mind" Reports, by P. de Berker, Principal Psychologist, H.M. Prison, Brixton; "The Habitual Criminal," by R. S. Taylor, Senior Psychologist, H.M. Prison, Wandsworth; "Delinquency in Industrial Areas," by David Lowson, Assistant Borstal Governor.

Canadian Bar Journal, August 1960: "Preparation for Effective Sentencing," by R. I. Cheffins, Montreal.

ENGLISH LAW

Law Quarterly Review, July 1960: "Conversion by an Involuntary Bailee," by H. W. Burnett; "Criminal Omissions: The Duty Requirement in Offences against the Person," by P. R. Glazebrook.

Modern Law Review, July 1960: "Return to *Dunlop* v. *Selfridge*," by M. P. Furniston, University of Birmingham; "Hire Purchase Agreements as Bills of Sale," by Aubrey L. Diamond, Lecturer, London School of Economics; "The Mental Health Act, 1959" (comments on various aspects).

Public Law, Autumn 1960: "Planning Appeals and the Adjudication of Policy," by Professor Mandaker, Indiana University.

Modern Law Review, September 1960: "Hire-Purchase Agreements as Bills of Sale" (conclusion), by Aubrey L. Diamond, Lecturer in Law at London School of Economics.

Law Quarterly Review, October 1960: "The Queen's Bench Master," by Master A. S. Diamond; "Construing, without Constructing a Contract," by G. H. L. Fridman; "Criminal Evidence Act, 1898, s. 1 (*f*)," by Rupert Cross; "Liability and Compensation (*Re Polemis*)," by A. L. Goodhart, K.B.E., Q.C.

FOREIGN AND COMPARATIVE LAW

Revue Internationale de Droit Comparé, April—June 1960: "Settlement of Collective Industrial Disputes in Comparative Law," by Professor O. Kahn-Freund, University of London; "Equity and Public Administration in the Netherlands," by Professor Simons, School of Advanced Economic Study; "Polish Civil Procedure," by Professor Jerzy Jadlowski, Warsaw.

New York University Law Review, June 1960: "The Journalist and his Informant," by P. B. Carter, Barrister-at-Law.

Journal of the International Commission of Jurists, Winter 1959, Spring—Summer 1960: "Judicial Administration in Japan," by Chief Justice Kotaro Tanaka of the Supreme Court of Japan; "Norwegian Parliamentary Commission," by Chief Justice Terje Wold of the Supreme Court of Norway; "Law, Bench and Bar in Arab Lands," by Saba Habachy of Cairo Bar and Columbia University; "The Judiciary in the '*Communauté*,'" by Judge Gilbert Mangin; "Comparative Outline of Legal Aid," by Norman S. Marsh, Editor of the Journal.

Western Political Quarterly, June 1960: "Judicial Review and Civil Rights in Japan," by P. Allan Dionisopoulos, Indiana University.

Modern Law Review, September 1960: "British and American Legislation on Restraints of Competition," by Dean Eugene V. Roston, Yale University.

Revue Internationale de Droit Comparé, July—September 1960: "Comparative Law and the General Principles of Law," by Professor Giorgio del Vecchio, Faculty of Law of Rome; "Equality of Spouses' Rights in Polish Law," by Joseph St. Piatowski, Doyen of Law Faculty, Lodz University; "The Investment Trust in Belgium, France and the Netherlands," by Walter van Gerven, Comparative Law Centre, Brussels; " Proposed Legislation on Contracts of Adhesion in Israel," by Professor Guido Tedeschi and Ariel W. Hecht, Jerusalem University.

INTERNATIONAL LAW

Law Quarterly Review, July 1960: " The Inner History of the Declaration of Paris," by Olive Anderson.

American Journal of International Law, July 1960: " Subversive Intervention," by Quincy Wright, University of Virginia; " The Nottebohm Judgment," by Josef L. Kunz, University of Toledo; " State Contracts and State Responsibility," by F. A. Mann, LL.D., DR.JUR.(Berlin); " Joint Development of International Waters," by William E. Kenworthy of the Colorado Bar; " Soviet Union and Co-operation in use of Atomic Energy," by George Ginsburgs.

American Bar Association Journal, July 1960: Articles on the Connally Reservation, by Lyman M. Tondil, Jr., New York Bar, Arthur Larson, Duke University, Alfred J. Schweppe, Washington Bar, and Frank W. Grinnell, Massachusetts Bar. In the September number of the Journal: " Surprise Attack: Crime at Pearl Harbour," by Judge James J. Robinson, Supreme Court of Libya.

Modern Law Review, September 1960: " The Eichmann Case," by L. C. Green, University College, London.

JURISPRUDENCE

Revue Internationale de Droit Comparé, April—June 1960: " Ownerless Rights," by Professor Neumayer, Lausanne.

LEGAL HISTORY

American Bar Association Journal, June 1960: " Chief Justice Hale and the Leystoff Witches," by Harold F. Porter, Jr., New York Bar.

MEDICINE AND LAW

Canadian Bar Journal, June 1960: " Why do People sue their Doctors ? " by Dr. A. A. Klass, Winnipeg; " Liability of Professional Men for Negligence and Malpractice," by C. K. Tallin, Q.C., Winnipeg.

PARLIAMENT

Public Law, Autumn 1960: " Urgency Motions in the Commons," by W. H. Greenleaf, University of Hull.

REVENUE (BRITAIN)

British Tax Review, May—June 1960: " Schedule A Tax," by C. N. Beattie; " Fingers Burnt by section 412 of Income Tax Act, 1952," by Philip Lawton; " The *Ostime* Case," by J. L. Montrose.

British Tax Review, July—August 1960: Is devoted substantially to the Finance Act, 1960, special articles dealing with Hobby Trading; Profits by Artificial Devices; Sums received after Trade or Profession ceased; Compensation for Loss of Office; Revenue Penalties and Back Duty.

ROMAN LAW

Law Quarterly Review, July 1960: "Terminology in *Mancipatio*," by Alan Prichard.

SCIENCE AND LAW

Forensic Science Society Journal, September 1960 (the first issue of a publication by a new Society on a subject not now limited to the medical sphere): Symposium on Investigation of Fatal Road Accidents including Police Action, Interpretation of Injuries, Examination for Sobriety, Mechanical Faults, Laboratory Investigations; "Forensic Estimation of Age in Infancy by Dentition," by Maurice V. Stock, University of Bristol.

SOCIAL SCIENCE

Western Political Quarterly, June 1960: "Mill and Green on the Modern Welfare State," by Harry Holloway, Texas University.

Periodicals also received: *Jus* (*Milan*), *Documentation Juridique Étrangère*, *La Justícia* (*Mexico*), *Documentos para la Historia de un Gobierno* (*Mexico*), *Civil Liberties Docket*, *Revista Jurídica de la Universidad de Puerto Rico*, *Revista del Foro* (*Peru*).

RECENT LITERATURE

Guenther Podola (Crime Documentary No. 1). By Rupert Furneaux. 1960. London: Stevens & Sons, Ltd. 18s. 6d. net.

On July 13, 1959, Guenther Podola was detained by two detective officers of the Metropolitan Police. One left to summon a police car. Podola shot the other while his back was turned and escaped. He was traced and arrested three days later in his hotel bedroom. When the door was forced open (the police were taking no chances), Podola was standing behind and received a black eye. It was widely reported at the time that he had been beaten up by the police, but this was disproved at his subsequent trial.

What made the case of exceptional interest, public as well as legal, was not the trial itself but the preliminary proceedings. It was stated in bar of trial that the accused suffered from loss of memory, or hysterical amnesia, and that he was therefore unable to instruct his defence. That plea raised two issues, the fact of his condition and its legal effect. As in the Scottish case of *Russell* (1946 J.C. 37—cited in this book as 1946 Session Cases (J.) and once as " Sessions " Cases 1946 S.L.T. 93), there was a preliminary inquiry, but with this difference: in Scotland the evidence for the defence (none was led for the Crown) was heard by a judge alone, while in England the preliminary issue of fact was tried by a jury. In *Russell's* case both counsel agreed that amnesia had been established (a concession withdrawn by the Crown on appeal); in *Podola's* case the jury returned the positive verdict, " Podola is not suffering from genuine loss of memory." It was therefore unnecessary for the trial judge to consider the legal effect of the plea.

Well over half this book is devoted to the preliminary inquiry and the evidence is given in some detail. That of the prisoner himself, for example, occupies nearly sixty pages, in question and answer form. It is stated that only digressions are omitted, but no indication is given as to the nature of these digressions. A chapter is devoted to the evidence of each of the psychiatrists who gave evidence, for there was weighty evidence on each side. One thing is clear: if Podola was feigning, he did so with surprising skill.

The trial proper was of little interest as there was no active defence, and Podola was convicted of capital murder. No appeal was taken because of the decision in *R.* v. *Jefferson* (24 T.L.R. 877) that no appeal lay against a finding of fitness to plead. The Home Secretary on his own initiative referred the case to the Court of Criminal Appeal and the proceedings in that court form another useful part of the book. Unfortunately the author has here adopted an unsatisfactory technique. In narrating the arguments of counsel he has relied mainly on those presented to the trial judge: anything peculiar to the appeal arguments is presented in square brackets. Scots lawyers will find particularly interesting the discussion of the

Russell case and Lord Dunedin's dictum in *Brown* ((1907) 5 Adam 312). It is helpful to find in an appendix a full account of the proceedings on circuit in the *Russell* case but less so to have to search for the High Court proceedings and the judgment of that court in the excerpts quoted by counsel in their arguments. This is a minor inconvenience for those with access to the Scottish reports, but must cause difficulties for other readers.

The legal issues decided in the *Podola* case were three. First, *Jefferson* was overruled and fitness to plead is now an issue which may be appealed. This must surely be right. If a man is wrongly held fit to plead and then convicted after trial, the conviction is as much a miscarriage of justice as if he had been convicted after a blatant misdirection in law. Secondly, it was held that the onus of proving insanity lies on the party who alleges it. This again is surely common sense, though it was suggested by Mr. Lawton, Q.C., for the defence that no onus lay on either party and that the preliminary investigation was an inquiry and not a trial. This suggestion, however, leaves the very obvious query: *quid juris* in the event of the evidence being equally balanced or nearly so? That, after all, is the very case where onus matters.

Thirdly, it was held that even genuine amnesia did not of itself render the accused insane so that he could not be tried. In this, the law of England agrees with that laid down in Scotland in the *Russell* case. No *fiat* was granted to the Attorney-General for appeal to the House of Lords, though surely the last point at least was one of exceptional importance. To admit such a plea lightly would be to paralyse the administration of justice. But where a man is proved to be suffering from a genuine loss of memory (and this is by no means an easy thing to do, so that such cases would be rare indeed), how can he be said to be truly able to defend himself or to instruct his defence? And if he cannot do so, how can he have the fair trial which is the aim of the courts on both sides of the border? Undoubtedly public feeling at the time was strongly against Podola; the man in the street would have been horrified by the idea of a foreigner " getting away with " the murder of a detective officer who was simply and quietly doing his duty. But that is by no means a final criterion either of law or of justice, and one cannot avoid the same kind of uneasinesss as was felt about the case of William Joyce.

This book is a source of valuable material for the legal and, I should imagine, the medical reader, although it is not in the same class as regards documentation (in spite of the title of the series which it inaugurates) as the full reports to which we are accustomed in the *Notable British Trials*. And for the general reader Mr. Furneaux has, in spite of the criticisms made earlier, produced a workmanlike, interesting and readable account of the case and the issues raised by it.

Should a second edition be required, it is to be hoped that some annoying misprints will be eliminated, *e.g.*, " a foreigner without friend's " (p. 30); " an *amici curiae* " (p. 243); " J. B. Smith " for " G. J. Smith " (p. 282).

J. G. W.

Pioneers in Criminology. Edited and introduced by Hermann Mannheim. 1960. London: Stevens & Sons. 45s. net.
Restitution to Victims of Crime. By Dr. Stephen Schafer. 1960. London: Stevens & Sons. 25s. net.

The publication of these books—the first two in a new series entitled the Library of Criminology sponsored by the Institute for the Study and Treatment of Delinquency—coincided with the opening in London of the second United Nations Congress on the Prevention of Crime and Treatment of Offenders. The inauguration of this new Library, the change of title of the *British Journal of Delinquency* to the *British Journal of Criminology*, and the increasing interest which is being shown in the studies and research now being undertaken with the worthwhile aim of attempting to find ways by which the incidence of crime may be reduced, all combine to focus attention on the development of criminology not only as a social science but as a practical approach to the very difficult problem of delinquency in all its aspects.

Pioneers in Criminology represents the collection of a series of articles which appeared between 1954 and 1958 in the *Journal of Criminal Law, Criminology and Police Science*, a bi-monthly publication issued under the aegis of the Northwestern University School of Law, Chicago. Each article, written by a recognised authority in the field of criminology, provides a vivid account of the life work of some of the more outstanding of those scholars who, during the period from about 1760 to 1940, devoted their abilities to studies of criminal behaviour and penal treatment. Dr. Hermann Mannheim in a thoughtful introduction emphasises the importance and value of the articles and a conclusion consisting of a short account of the historical development of criminology is contributed by Clarence Ray Jeffrey.

The first article is a portrait of Beccaria, the Italian mathematician and economist, who became interested in criminal court procedure and penal practice and advocated that punishment was appropriate only if it helped to prevent crime. Jeremy Bentham, with his majestic philosophising and insistence that punishment should not be imposed to achieve vengeance but to prevent the commission of crimes, is the subject of the second study. From there we move through the contributions made in their daily work by Alexander Maconochie, Isaac Ray, Charles Doe and Henry Maudsley to a better understanding of the problems of criminality and the trial and punishment of criminals. The important place filled by Lombroso, and of his pupils Garofalo and Ferri, in the development of criminology is adequately recognised and the effect of his theories on the work of Tarde and Goring is fully discussed in the articles on those great scholars. The legacy of all the " Pioneers " (many of whom would be surprised to find themselves so described) to criminal science is fittingly recorded and properly evaluated. Some of their ideas were naïve, others incorrect; but " to despise the knowledge of the past as worthless and its errors as contemptible would be obvious ingratitude and folly." Each fashioned one or more rungs of the ladder which gave access to the first principles from which studies into the causes of crime, its prevention and the treatment of offenders could commence.

Although it might have been hoped that the first volume in the Library of Criminology would have been a penetrating and up-to-date survey of this new subject, there can be no doubt of the value and historical appropriateness of beginning with an account of the work of the first disciples in the criminological field.

It is axiomatic that a book which is magnificently entitled *Restitution to Victims of Crime* but which extends only to 129 pages of generously spaced type will be disappointing. Dr. Schafer has approached this involved problem in a workmanlike, if uninspiring, fashion. He has recorded briefly in the first and major part of his book the facts regarding the legal rights of the inhabitants of twenty-nine countries in Europe, Russia, North, Central and South America, the Middle and Far East, Australia, New Zealand, and South Africa, to obtain compensation for any suffering, loss, injury or damage—physical, material, mental or moral—caused to them by a criminal act. The account discloses that in all the countries embraced in the survey the law enables the victim of a criminal attack (and in some cases his legal representative) to seek restitution from the offender. In some countries compensation, at least in respect of certain offences, may be awarded by a criminal court. In other countries a claim for restitution may only be pursued in the civil courts, while in yet a third category of countries the civil procedure method is duplicated by parallel provisions in the criminal procedure enabling the victim to be joined to enforce his claim for damages in the course of the criminal trial. In many countries a criminal court on conviction of an offender may apportion the sentence between punishment and compensation or take into account in assessing the punishment whether there has been any attempt to make restitution to the victim and, where there has been, to consider the award of a suspended sentence.

As an additional and tenuously connected issue Dr. Schafer has integrated into his factual summary information regarding the provisions for enforcement of payment of compensation and whether the penal system in each of the countries with which he deals enables or requires a prisoner from the earnings paid to him in prison to make any monetary contribution towards restitution to the victim of the crime.

It is not until the last few pages of his book that Dr. Schafer examines the anomaly of the state undertaking to protect the citizen and yet, when he is the victim of a criminal attack, making no restitution to him. In this concluding part of the book we are provided with stimulating reading in a brief discussion of the problems which might emerge if restitution were substituted for punishment. It is hoped that other scholars will be encouraged to study this aspect of the penal law, consider it in the light of the rights of reparation in the civil law and evaluate whether the state should be concerned only with the punishment of the criminal. Punishment has as its avowed aim the reformation of the criminal and his rehabilitation. Might one way to achieve this not be to make his sentence in some way beneficial to the victim?

J. V. M. S.

The English Prisons. By D. L. Howard. 1960. London: Methuen & Co., Ltd. 21s. net.

This book has been published at a time when there is a sincere desire on the part of an increasing number of responsible people to understand and decide about the methods of treatment which should be applied to offenders. Although nowadays no one would advocate a return to the inhuman and savage punishments of yesteryear, there are many who are aware of a conflict in their minds on the subject of prison treatment. Although it is accepted that modern punishment is not a form of civilised revenge, that it is retributive only in so far as it deprives a man of his liberty and that it must have for its aim reformation, there is a doubt—in view of the mounting toll of recorded crime—about its effectiveness in the prevention and reduction of crime. Some of the ideas put forward in this book may help in the settlement of any such conflict and accordingly it is hoped that it will be read not only by all those persons concerned in the administration of criminal justice but by members of the ever-growing circle of the public which has been awakened to the realisation that criminals and how they are punished are just as much a responsibility for everyone to shoulder as any other social problem.

The English Prisons has the merit of being very readable. The first part sketches—with a few inaccuracies and, because it is brief, somewhat patchily—the ways and places in which punishment first began to be inflicted on criminals. It is probable, however, that intentionally and not accidentally it has been skilfully compiled to create in the mind of the reader, page by page, a slowly mounting indignation at the haphazard, callous and completely irresponsible attitude towards prisons which marked the eighteenth and early nineteenth centuries, culminating in the latter part of that century in the positively vicious and sadistic programme of prison methods. Had society during the seventeenth, eighteenth and the early part of the nineteenth centuries been required to justify the absence of any constructive penal policy, it would no doubt have excused itself by observing that a criminal by his conduct had forfeited all right to membership of society and could only expect to languish in gaol. That is what a prisoner then did, and John Howard, Elizabeth Fry, Sarah Martin and Foxwell Buxton attempted by practical aid and campaigns to relieve the squalor and suffering of the inmates which were the results of the chaotic conditions in the gaols of the period.

At that time, however, the government's sins were principally of omission. An inability or unwillingness to be troubled with convicts and the achievement of this by their transportation to the other side of the world where they would be out of sight and therefore out of mind can be understood, and pitied. The subsequent inhumanity of penal practices, which degraded prisoners and destroyed them, in soul and body, by solitary confinement in dark cells and work on the treadmill, can never be forgiven.

The author carefully surveys the unintended, but when viewed from the viewpoint of today remorseless, development of a method of treatment of offenders which could only have one result, the mental, physical and moral debilitation of every convict. A factor contributing to this disastrous policy was the nationalisation in 1877 of the prison organisation under the control of the Home Secretary. This resulted, not only in standardisation of pay and conditions of service for prison staffs, but, what is the very reverse of the aim of every modern penal institution, the treatment of all offenders exactly alike. "The man who entered an English prison lost all his individuality. He entered a grim, artificial world where no allowance was made for variations in character and temperament; where any good in him was not recognised, and where all prisoners were considered equally undesirable and wicked." The decision taken in 1847 to adopt the Pentonville pattern (which ensured the cellular isolation of every inmate) for the majority of prisons to be erected in Britain, was the first factor which influenced penal policy and rendered impossible any reformative aim. The régime within that type of prison, under which the inmates were provided with a plank for a bed, forced to work at entirely unproductive and exhausting tasks, incarcerated in isolation and utter silence and deprived of any social intercourse with other inmates or with the staff for the whole of their sentences, resulted in men and women who went into prison as people leaving it "as Lombrosian animals, shorn and cropped, hollow cheeked, and frequently as a result of dietary deficiencies and lack of sunlight seriously ill with tuberculosis. They came out partially numbed and some of them insane; they became the creatures, ugly and brutish in appearance, stupid and resentful in behaviour, unemployable and emotionally unstable, which Victorian middle classes came to visualise whenever they thought of prisoners. Much of the prejudice against prisoners which remains today may be due to this conception of them not as the commonplace, rather weird people the majority of them really are, but as a composite caricature of the distorted personalities produced by the prison machine of the last part of the nineteenth century."

The conclusions of the departmental committee under the chairmanship of Herbert, later Lord, Gladstone, published in 1895, which recommended that prison treatment should have as its primary and concurrent objects deterrence and reformation, paved the way for legislation effecting much needed and desirable changes in penal policy. From this dawn of a new day in penal practice in the United Kingdom Mr. Howard describes the warming sunshine of the new and varied methods of treatment for different classes of offenders—Borstal, probation, preventive detention, the establishment of juvenile courts, remand homes, attendance and detention centres—and in the second part of his book he contemplates the imperfections of present-day prisons in England and indicates what developments are desirable and practicable so that in the future offenders will be treated in a way which ensures that on their release from prison custody they may return to the community as law-abiding citizens.

J. V. M. S.

Gentlemen of the Law. By Michael Birks. 1960. London: Stevens & Sons, Ltd. 25s. net.

All reviews of this book must necessarily stress its value as a contribution to social history. Its approach is greatly helped by the erudition of the author who holds the office of Principal Clerk to the

Registrars of the Chancery Division of the High Court. He possesses, no doubt, a great experience of modern solicitors and a capacity to reflect on their differences from their predecessors. The only criticism that could arise is whether he may not have taken on a longer period of history, stretching from 1200 to the present day, than can be dealt with in a single study without having to treat too briefly some of the historical topics involved. The learned may find such a course superficial while the tyro may find it insufficient. This may, however, be considered mitigated by the fuller accounts of various personages whose records he elaborates. The author expresses a preference for dealing with individuals in this way rather than groups and exercises it successfully.

An outline is given of how representation in litigation came to be admitted at all and how these representatives gradually attained a professional character. He shows how they became distinguished from the actual officers of the court and from barristers. Jealousy between the various King's Courts contributed to the problem. The increasing attraction of London as a sphere of operation is pointed out and the consequent development of the country lawyer as a general man of business rather than as an expert in litigation. The quarrels between the attorneys and the scriveners and between the attorneys and the solicitors are sketched. The latter were scoffed at as "Gentlemen by Act of Parliament." However, one suspects the author of a slight cynicism in the choice of a title for his book, for many of those with whom he deals can scarcely be considered gentlemen in any sense of the word, while some of them were rogues of a pronounced cast. One of them as late as 1735, William Wreathock, was actually sentenced to death as a highwayman, which at any rate qualified him as a gentleman of the road.

Some solicitors, such as Thomas Cromwell under Henry VIII, attained to high place; others, such as William Powell who died in 1656, did very well financially, as did John Chauncey a little later.

Mr. Birks deals with the gradual reforms which eventually succeeded in rendering the profession more satisfactory. The series of Acts of Parliament commencing in 1729 led the way and the formation of legal societies, not all of which retained their vigour for long, up to the Incorporated Law Society, helped greatly in the same direction. In the Georgian period, some solicitors, such as Joseph Hickey and his son William, featured in both fashionable and literary circles, while others, such as Robert Hobbes of Stratford-upon-Avon, are pictured as living a full life in the country.

A chapter is devoted to the twentieth century and the author has something to say of the questions which in increasing numbers have had to be faced by solicitors. He ends with a reflection on the large number of barristers who would not have gone to the Bar without relations in the other branch of the profession; but perhaps some of them were unwise to depend on such support, and took to the role of colonial attorneys, whose history the book also delineates.

A tribute should be paid both to the selection of illustrations and to the choice of apposite and often contemporary quotations at the heads of the chapters. Indeed the get-up of the book as a whole is pleasing and the price not excessive.

S. G. K.

Acta Juridica, 1959. Published under the auspices of the Faculty of Law, University of Cape Town. 1959. Cape Town: A. A. Balkema. £2 net.

The first issue of this periodical was reviewed by Professor McKerron in 1959 *Juridical Review* 262. The second issue is devoted to the centenary of the Faculty of Law of the University of Cape Town. It contains an interesting history of the development of the Faculty in the last hundred years by Professor D. V. Cowen. He observes that it was the lack of scientific training in Roman-Dutch law which set back the prospects of South African law in the nineteenth century. The first full-time Professor of Law was appointed only after the former South African College became the University of Cape Town in 1918. He was Professor George Wille, who in 1959 was one of four distinguished lawyers who received the honorary degree of LL.D. at a special graduation ceremony to mark the centenary.

The laureation addresses delivered by Professor Cowen in the capacity of Public Orator are printed at the beginning of the volume. The only one of the graduands from outwith the Union itself was Professor T. B. Smith from Edinburgh. In presenting him, the Public Orator dwelt on the affinity between South African law and Scots law and on " the frequency with which Scots institutional writers have been and still are cited " in South African courts. After detailing the graduand's distinctions, the Public Orator concluded, " it is to him that many look with justifiable confidence to ensure that the torch of Scots law burns ever more vigorously."

The remainder of the volume consists of a number of papers which were either delivered at the Conference which constituted the more serious side of the centenary celebrations or were prepared in tribute to the occasion.

Professor Smith's own contribution was a discussion of " Scots Law and Roman-Dutch Law—a shared tradition." He brings out the similarities of development of the two systems, with Stair and Grotius as the two Colossi bestriding the legal history of their respective countries with their great synthesising works, which for the first time created an integrated legal system from the elements of customary law and the received Civil Law. He describes the close links joining Scots law with the Roman-Dutch law in the eighteenth century, and their sudden severance in the nineteenth. The story is well-known but Professor Smith gives it a contemporary urgency as he seeks to re-establish contact between the two systems. He also restates his view that Scottish students should be " primarily concerned with the evolved Romanistic law." No one will deny the importance of knowing of the later developments of Roman law; but what worries some of Professor Smith's colleagues is that, if the developed law is described without a preliminary foundation of Roman law *as the Romans knew it*, it may produce results which are just as " haphazard, unplanned, and juristically exotic " as is Scots law deprived of its Civilian life force.

The legal historian will welcome Professor Scholtens' account of " Early Roman-Dutch Law." He concentrates on the period between the reception of Roman law and the publication of Grotius' *Inleidinge* in 1681, and his main source is the seven volumes of *Hollandsche*

Consultatiën, or legal opinions by various eminent practitioners. A characteristic feature of these opinions is that the binding force of Roman law is taken for granted, it being considered self-evident that Roman law was part of the law of Holland. Scholtens demonstrates that although in particular cases the established customs of Holland were preferred to the Roman law, *e.g.*, in intestate succession, it is false to say, as some have done, that the Roman law had only the force of subsidiary law. In fact it " permeated the whole of the system."

A lively study of the adaptation of Roman law to modern conditions is found in Professor van Warmelo's paper on Real Rights. Roman law knew only a limited number of real rights, but new ones arising out of feudal relationships were introduced in the developed law. The authorities did not agree as to what constituted real rights, and the modern definition must take into account statutory creations, such as Patents and Trade Marks, to say nothing of mineral and other rights registered in the Deeds Registry. Van Warmelo argues that the vast extension of registrable rights in land results in the practical jettisoning of the concept of servitude, but rightly concludes that if society " wishes to turn back to feudalism, it should at any rate not be stopped merely for the sake of form and dogma in the law."

In view of the recent cases on the subject in this country, Scots lawyers will find Professor Pont's article on " Marriage of minors without parental consent " of interest. The question of whether such a marriage is void or voidable under South African law is generally regarded to be an open one, and Pont acutely analyses the relevant doctrine before and after the Reformation and the complicated manner in which it has been affected by subsequent statute law.

The longest article in the volume is Professor T. W. Price's sixty-four-page attack on the duty of care in the Aquilian action. It is indeed " a return to the charge," as the matter has been a source of debate between him and Professor R. G. McKerron for several years. The arguments marshalled on either side are often historical, ostensibly directed to the question of whether or not the courts have recognised the notion of duty of care as an essential element in liability. In the last resort, however, what is involved is a question of legal policy, *viz.*, how wide should liability for negligence be? It is no coincidence that the opponents of the duty of care are also propagandists for the extension of liability to cover omissions, negligent misstatements, and indeed any kind of purely financial loss if it is the result of culpable conduct—conduct, in Price's words, " which is considered to be unreasonable in the circumstances." The reviewer is among those who see the need for a restrictive principle limiting liability for negligence. They consider that the same act may be negligent in relation to A but not negligent in relation to B, and that it is more convenient, and probably more just, to explain such a situation by saying that in the circumstances a duty of care is owed to A and not to B than by applying a general foreseeability test.

Professor Price discusses extensively the various cases over the last forty years in which the doctrine of duty of care has been invoked. A crisis was reached in 1956 with the case of *Union Government* v. *Ocean Accident & Guarantee Corporation*, 1956 (1) S.A. 577 (A.D.), in which the majority of the Appellate Division appears to have definitely considered the notion to be essential to Aquilian liability. Professor Price regards the duty of care as tainted by its common law origin and as such alien to the Aquilian action. In arguing this point of view he provides a stimulating analysis of the general concept of Aquilian liability which will be of interest wherever actions in reparation are based on Aquilian principles.

Various articles survey the development of particular branches of South African law: Water Law by Professor de Wet, Marriage Law by Professor Hahlo, Criminal Law by Professor Burchell. Professor Beinart traces the requirements of two types of privileged wills, the military will and the charitable will, through Roman Law, Roman-Dutch Law and modern South African law, and Dr. de Vos, in the solitary article in Afrikaans, discusses the legal position of the possessor. Mr. Turpin contributes an interesting note on characterisation and policy in the Conflict of Laws, in the course of which he discusses a South African case, *Anderson* v. *The Master*, 1949 (4) S.A. 660 (E.), in which a husband and wife whose matrimonial domicile was Scottish had acquired a South African domicile when the husband died leaving nothing to his wife in his will. It was held that her proprietary rights to the testator's estate were to be determined by Scots law, and that she was entitled to the *jus relictae*.

Other articles in this wide-ranging volume are by Clinton Rossiter (" The Supreme Court in American Society "), C. K. Snyder (" Executive Power, Presidential Government and Abraham Lincoln "), W. van Ryswyk (" Nicolas of Cusa—An early Political Pluralist "), T. F. Carney (" Two Notes on Republican Roman Law "), and an unpublished fragment found among the papers of the late R. W. Lee on Roman Law and Common Law elements in the law of South Africa and Ceylon.

PETER STEIN.

(a) *Scritti di Storia del Diritto Italiano*. By Pietro Torelli (1880–1948). lii and 714 pp. 1959. Milan: A. Giuffré.

(b) *Jacobus de Ravanis: Summa Feudorum*. Edited by C. Pecorella. Second edition. 72 pp. 1959. Milan: A. Giuffré.

(a) In this substantial volume the Law Faculty of the University of Bologna have collected a number of the more important studies in legal history by their late colleague. Though while he lived he ploughed a lone furrow, Pietro Torelli is now regarded as one of the most influential legal scholars of modern Italy and chiefly responsible for the current revival in the study of medieval Roman law.

For many years after his graduation, Torelli worked as an archivist and he insisted that legal history should be based on a mass of private documents. Only against a fully documented background of social and economic history could the development of the institutions of private law be properly traced. His earlier studies were in the constitutional, social and economic evolution of the Italian city state, and particularly his native Mantua. This phase of his work is represented by the study " *Capitanato del popolo e vicariato imperiale come elementi costitutivi della Signoria Bonacolsiani* " (pp. 375–480).

In it he describes the change over from a communal to signorial form of government, and the further change when the signore became imperial vicar, and shows from a study of the documents that the changes were gradual and that officials and institutions belonging to one régime survived into the next. In the same vein is his later study "*Tradizione romana e rinascimento degli studi di diritto nella vita pratica dei secoli XII e XIII*" (pp. 495–516). Here he brings out the importance of the notarial office and notarial practice in the spread of the new Romanistic learning which centred on Bologna in the twelfth and thirteenth centuries.

In 1928 Torelli turned his attention to the work of the medieval Glossators, and for the rest of his life he devoted himself to this field of study in which he became pre-eminent. He realised that the Glossators and Commentators were individuals and that for a proper understanding of the way in which legal institutions were developed more publications of the works of individual jurists were necessary. In tribute to the University of Modena, where he taught until he was called to the great Law School of Bologna in 1935, Torelli directed himself first to the works of the two jurists connected with the Modenese Law School—the Glossator Pillius, and the Commentator Guido de Sugaria. Pillius, whose *Distinctiones* he published from a Vatican MS. (pp. 227–262), emerged as a scholar with a distinctive personal approach to law and its teaching. In the case of Guido, Torelli unearthed new documents on the basis of which he reconstructed the commentator's life and traced his considerable influence on later commentators (pp. 293–348).

About this time a movement was begun—incidentally by the *Sindacato Nazionale avvocati e procuratori*, a practitioners' organisation—for a new critical edition of the Great Gloss of Accursius, the collection of glosses produced about 1250. This collection had been included in all the early printed editions of the *Corpus Juris*, but scholars were beginning to suspect that in the two centuries which separated the compilation of the Great Gloss and the publication of the earliest printed versions, numerous additions and modifications had crept into the text. Only an investigation of the earliest MSS. could produce a reconstruction of the original text of Accursius. Torelli in effect assumed sole responsibility for this work. In a paper of 1933, *La Codificazione e la Glossa: Questioni e Propositi* (pp. 263–278), he discusses the objectives of the new edition and stresses the need for collecting pre-Accursian Glosses, of which there were numerous unpublished examples in the MSS. To keep the work within manageable proportions he restricted himself to the Gloss to the Institutes, and in 1934 published his plan of work. On the basis of a study of 188 MSS. he showed that there were two editions of the Accursian Gloss and he was able to isolate an intermediate phase between the two editions. He also, surprisingly, found that many of the additions which had come into the MSS. after 1250 were not the product of later elaboration but the insertion of pre-Accursian Glosses omitted by Accursius. In 1939 appeared the superb edition of the Gloss to Book I of the Institutes, but the War prevented any further publication. Torelli continued indefatigably to publish pre-Accursian Glosses to the Institutes, thus making possible a comparison between the work of

Accursius and that of his predecessors, and at the same time enabling scholars at last to arrive at a scientific judgment of the originality of Accursius himself. Three studies are of vital importance: those on the Glosses to the Institutes of Irnerius (pp. 43–94), of Bulgarus (pp. 95–166), and of Jacobus and Hugo (pp. 167–214).

Many of the papers reproduced in this volume were originally published in relatively obscure local periodicals and would be otherwise quite inaccessible today outside Italy. Yet they ought to be read in every country which claims a Civil Law foundation for its system, for they deal with a vital period in the development of modern Civil Law.

(b) C. Pecorella, a young scholar in the tradition of Torelli, has published the text of a manuscript in the Palatine Library at Parma giving a Summa of feudal law dating from the second half of the thirteenth century. It is attributed by the MS. to Jacobus de Ravanis, Jacques de Révigny, who, with Petrus de Bellapertica, led the movement in Southern France which took over from Italy the leadership of legal studies in that century. Révigny's authorship of the Summa was denied by the late E. M. Meijers of Leyden, but Pecorella argues strongly in favour of the correctness of the attribution. The text discusses the Lombard feu at a time when it had already lost its public character and become merely a form of agricultural holding—a development which took place earlier in Italy than elsewhere in Europe. The feu is divisible and transmissible to heirs, and the *servitium* is no longer an essential element. The feu is normally granted for money, and the relationship is in fact commonly described as *contractus*. We are told what is a feu, who can grant it, who can receive it, in what kinds of property it can consist, in what ways it may be acquired and lost. Anyone concerned with the early development of feudal law will find much of interest in this text.

PETER STEIN.

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(A later review is not precluded, especially where books are received shortly before going to press.)

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